

2005

Outlaws and their mortgages: an analysis of the Property (Relationships) Act 1984 (NSW)

Erin Elizabeth Cahill
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**Outlaws and Their Mortgages:
An Analysis of the *Property (Relationships) Act 1984*
(NSW)**

**A thesis submitted in fulfilment of the requirements for the award of
the degree**

DOCTOR OF PHILOSOPHY

from

University of Wollongong

by

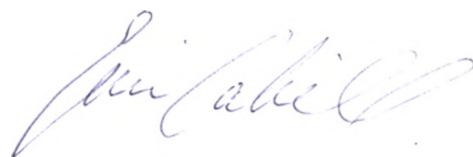
Erin Elizabeth Cahill, BA (Hons) (USyd)

Faculty of Arts

2005

Certification

I, Erin Elizabeth Cahill, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Arts, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

A handwritten signature in blue ink, appearing to read 'Erin Cahill', with a stylized flourish at the end.

Erin Elizabeth Cahill

8 February 2005

Table of Contents

Certification 2

Table of Contents 3

List of Figures 5

List of Abbreviations 6

Abstract 7

Acknowledgements 9

Introduction

 Acts of Outlawing: Introducing the *Property (Relationships) Act 1984 (NSW)*11

Chapter One

 The Legislative Bind: Framing the issues24

Chapter Two

 Unravelling the Bind: Situating the Lesbian Outlaw65

Chapter Three

 Truth and Silence: Knowledge and the Lesbian Outlaw86

Chapter Four

 Deviant Truths: An analysis of the *Property (Relationships) Act 1984 (NSW)* 113

Chapter Five

 Negotiating Truth: Analysing the Parliamentary Debate about the PRA 140

Chapter Six

 Silence in Chatter: A Media Analysis 168

Chapter 7

 The Act in Action: Lesbian engagement with the PRA 197

Chapter Eight

 Outlaws and their Mortgages: A Re-Take on lesbian engagement with the PRA 237

Conclusion260

Bibliography264

 Interviews 264

 Legislation 264

 Other Sources 267

Appendix 1293

Laws Governing Same Sex Relationships: State and Territory legislation, Australia 1999-2004.....	293
<i>Appendix 2.....</i>	<i>294</i>
Cases Heard Under s20 of the <i>Property (Relationships) Act 1984 (NSW):.....</i>	294
<i>Appendix 3.....</i>	<i>295</i>
Interview Advertisement	295
<i>Appendix 4.....</i>	<i>296</i>
Participant Information Pack	296
<i>Appendix 5.....</i>	<i>297</i>
Interview Questions.....	297

List of Figures

Fig. 6.1 171
 “Acts of Passion” Advertising campaign

Fig. 6.2 172
 “Acts of Passion” Advertising campaign

Fig. 6.3 184
 Frequency of lesbian and gay related issues, *Sydney Morning Herald* and the *Australian* 1997-2001.

Fig. 6.4 184
 Thematic Article Breakdown (issues relating to lesbians and gay men): *Sydney Morning Herald* and the *Australian* 1997-2001.

Fig 6.5 186
 Frequency of Law Articles (issues relating to lesbians and gay men): *Sydney Morning Herald* and the *Australian* 1997-2001.

Fig 7.1 199
 A Comparison of population Indicators: South Coast of NSW Local Government Areas.

List of Abbreviations

AAA:	<i>Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)</i>
DRAB:	"De Facto Relationships Amendment Bill 1998 (NSW)"
GLRL:	NSW Gay and Lesbian Rights Lobby
IVF:	In Vitro Fertilisation
MARB:	"Miscellaneous Acts Amendment (Relationships) Bill 2002 (NSW)"
NSWLA:	New South Wales Legislative Assembly
NSWLC:	New South Wales Legislative Council
PRA:	<i>Property (Relationships) Act 1984 (NSW)</i>
PRLAB:	"Property (Relationships) Legislation Amendment Bill 1999 (NSW)"
SPRB:	"Significant Personal Relationships Bill 1997 (NSW)"
TBWP:	<i>The Bride Wore Pink: Legal Recognition of Our Relationships</i>

Abstract

This thesis is an exploration of the *Property (Relationships) Act 1984 (NSW)* (the PRA). This piece of legislation instituted what was, at the time, the most progressive and furthest reaching recognition of same sex relationships within the Australian legislative system. Whilst recognising the important implications of the PRA, there are two remarkable features of this legislation upon which this thesis focuses. First, it instituted a legally sanctioned hierarchy of relationship types within Australian law, in terms of legal rights and enablement. Marriage sits at the top of this hierarchy, governed at both the state and the federal levels in Australia. This is followed by heterosexual de facto relationships under NSW state law and then same sex de facto couples within the same jurisdiction. The second notable feature of the PRA is that its usage within the higher ranks of the NSW court system has been relatively limited. Specifically, there are no cases, in the court setting, of lesbian couples using the PRA. This thesis approaches these two issues by characterising the existence and effects of the PRA as contradictory. The PRA enables lesbians within the legal system in the same moment that it contains and prevents the application of full legal citizenship. It argues that the PRA produces a symbolic (homosexual) legislative figure characterised by contradiction in terms of legal coverage, citizenship rights and basic appearance in law. It argues too that although the gender neutral definition of de facto that the PRA produced allows same sex relationships to be recognised under NSW law, the Act also limits its applicability to same sex relationships (particularly lesbian ones).

This thesis counter poses two theoretical approaches to exploring and explaining the PRA- liberal democratic theory and lesbian outlaw theory. It argues that liberal democratic explanations of laws and legal systems rely on a specific avoidance of articulating contradiction whilst simultaneously producing this effect. Liberal democratic theory takes account of contradiction only in so far as it represents a temporary failure of the application of liberal democracy itself. Conversely, lesbian outlaw theory is taken to explore contradiction as a fundamental characteristic of knowledge production. Lesbian outlaw theory is developed throughout this thesis as a feminist Foucaultian framework. The critique of binary logic by both feminists and

Foucault enables an understanding of and a theoretical focus on contradiction that liberal democratic theory appears incapable of providing.

Through such explorations of contradiction two common notions- silence and truth- appear. This thesis examines the PRA by locating the sites of truth and silence involved in its production (the writing process, the parliamentary debates and the advertising campaign) and in its application (through a series of interviews with women in long term lesbian relationships). The project of this thesis then, becomes an exploration of the ways in which liberal democratic theory shaped the production of the PRA and the ways in which lesbian outlaw theory can account for and address the ramifications of this.

This thesis concludes that an outlaw interpretation of the PRA allows two primary things: the exploration of contradiction as a function and effect of the PRA and an encouragement of conceptualising this contradiction as productive in nature. This then has flow on effects to legal scholarship, which this thesis also explores. The thesis concludes that lesbian outlaw theory can influence legal theorising and practice in a manner that better accounts for the experiences of lesbians than does liberal democratic theory and hence advocates for its use in such a manner.

Acknowledgements

After four years in production, there is a veritable list of people who need thanking for their role in making sure that this thesis came into being.

To begin with, I thank my primary supervisor Dr Fiona Borthwick (Sociology, University of Wollongong). I thank her for her academic help, and also for her encouragement, subtle reminders to keep working(!) and her sense of humour, particularly in the past twelve months. I thank too, my two other supervisors who have been a part of this thesis at varying times. Rebecca Albury (History and Politics, University of Wollongong) encouraged me greatly throughout my undergraduate degree and has given me guidance that has always had my best interests at the fore. I thank her particularly for taking up the baton in reading the final draft of this thesis. My thanks go too, to Dr Catriona Elder (Sociology, University of Sydney) for her comments on my thesis. My thanks go too, to Associate Professor Susan Dodds (Philosophy, University of Wollongong) for her comments on the theory section of this thesis. I thank her too for her dedication to keeping me employed (and hence, fed!) in the final twelve months of this thesis and for her encouragement throughout. Also, thanks to Professor John Bern (Sociology, University of Wollongong) for insisting that I read the primary Foucault texts in my undergraduate degree, regardless of the tears that it caused, and in doing so, fostering my knowledge and passion for Foucault. I thank him too for his earnest interest in my work over the past five years. Finally, my thanks to the Faculty of Arts at the University of Wollongong and in particular to my School, for the dedication to postgraduate students that they have fostered throughout my time here, which has provided numerous opportunities and experiences that may not have been available elsewhere.

I also want to express my deep gratitude to the women who participated in this study- to Jack Draper, Sand Hall, Patricia Campbell, Jen and Jen, Jo* and Sarah*, Anne* and Margaret*. These women gave their stories for scrutiny, comment and publication, which in itself is courageous. More than this however, they gave their stories with passion, humour and with a genuine belief in this project. For this, I am grateful beyond

*These are pseudonyms.

words. I am also appreciative of the numerous discussions with individual lesbians and lesbian based organisations over the past four years that has indicated support for this project and have aided me in thinking through various arguments.

I am happy too, to at last have the opportunity to thank my friends and family for their unwavering support and love throughout the often times painful production of this thesis. They have enabled and encouraged this achievement and for that I am eternally thankful. I thank all my fellow postgraduates for their various interactions throughout the years. My particular thanks go to my friends Kylie, Renee, Deb, Jo, Debbie, Myfanwy, Jodie and Eli who have fostered every step and provided important distractions throughout when needed! And to my family: my parents Pam and Rowan have always encouraged and enabled me to think and to excel in anything I have chosen to do. They have been role models for critical thinking but most importantly they have fostered within me a sense of justice and an aspiration for a better world which is the prompt for this work. My brothers Damien and Tim are both excellent academics themselves and I have valued their comments on my work. Most of all, I have and continue to value their friendship and love and support. My Aunt Jenny has always assumed a gentle encouragement and a genuine interest and belief in my life and my work. Finally, my family of choice: Malinda, words will not express my love and gratitude for *always* believing and just for being; and of course, to Kerrie, who has lived through the worst of everything this thesis was capable of bringing and whose love and support have enabled everything good this thesis has become. Gratitude, love and so much more that I cannot express. Thank you for choosing to journey with me.

Introduction

Acts of Outlawing:

Introducing the *Property (Relationships) Act 1984 (NSW)*

The history of Australia's legal treatment of lesbians and gay men is grim. From the outset of our current legal code, instituted through white invasion, homosexuality has been constructed in legal discourse as deviant. Homosexuality has been defined in legal texts in terms of criminal acts and activities, as a dangerous illness and, despite anti-discrimination laws, as a disqualifying factor for numerous social opportunities and activities. As a signatory to the United Nations Universal Declaration of Human Rights, Australia has, on more than one occasion, been held to account for the stringent nature of this legal treatment, read as a breach of human rights guarantees, in the international arena. In Croome v Tasmania for example, activist Rodney Croome challenged the antiquated sodomy and buggery laws of the state of Tasmania in the court of the United Nations throughout the early 1990s. Although a prolonged and greatly appealed case, in 1997 Croome garnered a benchmark- the complete decriminalisation of homosexuality in Australia. Although a huge step forward (particularly for gay men in Tasmania, the last state or territory in Australia to decriminalise homosexuality) the measurement of human rights against which this decision was made has proved most useful to those attempting more liberal law reforms for lesbians and gay men in Australia. This guarantee of human rights and non-discrimination has propelled a plethora of challenges to laws and legal systems, particularly at the individual state levels. This in turn has resulted in some radical alterations to Australian laws towards the legal inclusion and even protection of lesbians and gay men. The *Property (Relationships) Act 1984 (NSW)* (henceforth the PRA), the focus of the thesis, is one such legislative gain.

Despite this guarantee of human rights however, and the concurrent vast changes to the Australian legal landscape, there exists still a legal precedence of (even preference for) discriminatory treatment of lesbians and gay men in Australian law. In somewhat of a paradox, this too is demonstrated through the example of the PRA. The PRA expanded de facto relationship status to include lesbians and gay men in New South Wales

(NSW), under a proscribed set of circumstances. These limits form one layer of the discriminatory nature of the PRA, the effect of which is that a heterosexual union is more likely to be recognised under the PRA than a same-sex union. However, there are further layers to this discriminatory treatment. The PRA can also be viewed as discriminatory because it offers only piecemeal legal recognition to same sex couples. It also maintains an exclusively heterosexual definition of a de facto relationship alongside the gender neutral one that is inclusive of lesbians and gay men, which in application establishes a legally sanctioned hierarchy of relationship types into Australian law.

Despite this creation of legal discrimination, the PRA was heralded as a piece of major human rights legislation by various legal commentators. This thesis offers a challenge to such readings and argues that the symbolic significance of the PRA is decidedly underestimated if this liberal democratic rationale is the sole explanatory means of legal understanding. In response to such an argument the following questions are addressed: How have liberal democratic discourses shaped the production of the PRA and what effects has this had on the interpretation and implementation of the Act? Following from this: How do these liberal democratic interpretations and implementation processes engage with the lives of lesbians and gay men who are purportedly the beneficiaries of this new legislation? Since my research will indicate that the PRA is significantly underused by these groups I will also address the following questions in the thesis: To what extent is the PRA able to accommodate the lived experience of long term lesbian relationships through its liberal democratic discourse? And finally: Given the limitations of liberal democratic discourse identified in the thesis, how can legal theory be more reflexive in thinking about same-sex relationships generally and lesbian relationships specifically?

The remainder of the Introduction contextualises the PRA in a broader legal framework, examines the key legal and theoretical terms used in the thesis and provides a summary of subsequent chapters.

The Property (Relationships) Act 1984 (NSW)

The Property (Relationships) Legislation Amendment Act 1999 was, at the time of its

passage, the most comprehensive and radical recognition of same sex couples in Australian law, becoming an Act of Australian NSW Parliament on 28 June 1999. It passed through the Upper House of Parliament with a vote to the affirmative of 36 to 3, followed by an unopposed passage through the Lower House.

The Act amends the *De Facto Relationships Act 1984 (NSW)* (DFRA), now known as the *Property (Relationships) Act 1984 (NSW)*, by instituting two new definitions of intimate relationships- a gender neutral de facto spousal relationship and a 'domestic relationship'. For the purposes of the Act, a de facto spouse is defined as:

4(1)...

...a relationship between two adult persons:

(a) who live together as a couple, and

(b) who are not married to one another or related by family.

and a domestic relationship is deemed to be:

5(1)...

(a) a de facto relationship, or

(b) a close personal relationship (other than a marriage or a de facto relationship)

between two adult persons, whether or not they be related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(2) For the purposes of subsection (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

(a) for fee or reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation.)

The new 'de facto' definition applied to twenty one state laws, whilst the 'close personal relationship' has been applied to seven state laws. For the purposes of this study, the former definition of relationship will be the main focus although the latter will also be considered.

This shift in definition of 'de facto' enables the inclusion of same sex couples in NSW state legislation. Some 53 acts in NSW legislation include the definition of de facto, 21

of which were amended through the PRA to include same sex couples. This occurred in the following acts of NSW legislation:

- * *Anatomy Act 1977 No 126*
- * *Bail Act 1978 No 161*
- * *Compensation to Relatives Act 1897 No 31*
- * *Coroners Act 1980 No 27*
- * *Criminal Assets Recovery Act 1990 No 23*
- * *De Facto Relationships Act 1984*
- * *District Court Act 1973 No 9*
- * *Duties Act 1997 No 123*
- * *Family Provisions Act 1982 No 160*
- * *Guardianship Act 1987 No 257*
- * *Human Tissue Act 1983 No 164*
- * *Inebriates Act 1912 No 24*
- * *Insurance Act 1902 No 49*
- * *Judges' Pensions Act 1953 No 41*
- * *Law Reform (Miscellaneous Provisions) Act 1944 No 28*
- * *Legal Aid Commission Act 1979 No 78*
- * *Mental Health Act 1990 No 9*
- * *Motor Accidents Act 1988 No 102*
- * *Protected Estates Act 1983 No 179*
- * *Trustee Act 1925 No 14*
- * *Wills, Probate and Administration Act 1898 No 13*

The PRA extended many of the same rights and obligations held at the time by heterosexual de facto couples to those in long term same sex relationships. These included a number of rights after the incapacitation or death of a partner such as medical decision making capacities and inheritance rights. It also included the legalisation of financial arrangements such as joint accounts and property ownership in various Acts from means testing for social services through to the abolition of taxes when transferring property titles. There were however, a number of anomalies instituted through the PRA between heterosexual and same sex de facto couples. For example, adoption laws and anti-discrimination laws maintained the exclusively heterosexual

definition of a de facto relationship, originally established in the DFRA as:

(a) in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him, and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

My research focuses on the *PRA* as it was originally passed in 1999. Since that time a number of other laws have passed that have impacted in the PRA and its effect. In 2002¹ the "Miscellaneous Acts Amendment (Relationships) Bill (2002)" (MARB) passed through NSW Parliament amending a further 27 pieces of legislation to include the gender neutral definition. This Act extended the scope of de facto relationships legislation in two ways: it inserted de facto recognition in some Acts where previously it did not exist; and it extended the gender neutral definition of a de facto relationship in some Acts where a heterosexual definition had been in place. The MARB removed the majority of small scale inconsistencies between the two definitions of a de facto relationship. The major anomalies discussed above however, still applied. Neither anti-discrimination laws or adoption laws were altered. Hence, even after amendment, the three tiered system of relationship recognition within NSW law was maintained. The extent to which this tiered system was hierarchical was emphasised in a further act of NSW parliament in 2004, when the state agreed to hand over heterosexual de facto relationship laws to the Federal jurisdiction. The *Commonwealth Powers (De Facto Relationships) Act 2003 (Cth)* (CPA) deferred jurisdiction of de facto relationships, in relation to property disputes, division of superannuation and maintenance payments from the states and territories, to the Commonwealth. Although the Act referred both heterosexual and same sex relationships, the Commonwealth has refused the referral of same sex relationships. As such, the Act will bring heterosexual de facto relationships closer in line to marriage laws. It will give people in this type of relationship access to the Family Court system, including relationship mediation services and child endowment processes. This significantly reduces the cost and difficulty of a relationship breakdown. The Act also makes it possible for people in heterosexual de facto relationships to divide their superannuation upon a relationship breakdown- previously only available to married couples. The CPA again increases the legal privilege, measured through access to services and rights, accorded to heterosexual relationships

¹ This Bill became an Act of parliament on 1st November 2002.

within NSW. Although the scope of the PRA has increased marginally since its passage, the maintenance of this hierarchical system of relationship recognition still stands clear.

These amendments are given relatively cursory consideration throughout the thesis since it is beyond the possible scope of inquiry to account for the transient nature of law reform over the period of time in which a thesis is produced. However no reform since the passage of the PRA has altered the symbolic status of same sex relationships instituted in the PRA. That is, same sex relationships are still less endowed and less recognised than heterosexual relationships, be they of a marriage or de facto type. The primary focus of the thesis is on the PRA itself. It will focus on its passage through parliament and its interpretation and usage in the public sphere. This thesis however, will also consider this symbolic nature of the PRA and discuss the ramifications- both actual and theoretical- of it. In order to do this, I employ a number of theoretical tools and discourses that are discussed below.

Theoretical Framework

A theoretical exploration and implementation of the lesbian outlaw is presented to counter certain deficiencies of liberal democracy outlined in Chapter One. The lesbian outlaw is previously under theorised. This omission is addressed through an innovative development of the lesbian as a discourse and as a subject position along Foucaultian lines, and employs it in an analysis of the PRA. Throughout the thesis I will consider the power/ knowledge regimes involved in the production of the PRA. The lesbian outlaw framework is held in comparison to liberal democratic rationalities that, I argue, prompted and promoted the passage of the PRA. Two systems of understanding the PRA are juxtaposed in order to judge the possibilities each has for further law reform efforts on behalf of lesbians (and to a lesser extent, gay men) in Australia. I am conducting a lesbian outlaw analysis of the PRA whilst simultaneously developing and advocating this method of legal inquiry.

Outlaw theory has been articulated through two primary feminist areas of inquiry- literary theory and legal theory and takes many theoretical guises in different texts. The biggest inroad into outlaw theory, from a legal point of view, is Ruthann Robson's *Lesbian (Out)law* (1992). In the introduction to this text she proposes: "*Lesbian*

(Out)law is not intended to be the definitive text. I would like to start the conversation rather than have the last word. In this conversation, each speaker must take responsibility for her questions and conclusions, even tentative ones" (1992: 14). This challenge is taken up by developing a more involved look at outlaw theory from both a legal and a literary perspective, bringing together the two fields of feminist theorising to discuss the commonalities and the strengths in combining the two, previously unconnected, strands. It then applies a Foucaultian analysis to enhance and expand the understanding and usefulness of this discourse.

As a figure within literary and academic literatures, the outlaw, and more specifically, the lesbian outlaw, appears not out-of-law, but rather straddled between in law and out of law discourses. This image of contradiction is key to understanding the lesbian outlaw as I propose it. Outlaws are never completely out of law, or out of systems that order and manage. They are instead, straddled between discourses, but able to articulate and privilege an outlaw perspective through an acknowledgement of the contradiction inherent in their position. My contention is that the outlaw position can be brought together in a practical manner to formulate a feminist standpoint from which to analyse the functioning and effects of law. In order to demonstrate this however, I first need to articulate my symbolic interpretation of the PRA.

The PRA created a new symbolic figure in law. This enabled homosexual being is fraught with contradiction. For example, the relationships of lesbians and gay men feature in only 21 of a possible 53 Acts containing the term "de facto" in NSW legislation. NSW Acts, which do recognise the relationships of lesbians and gay men are contradicted by laws in other states and at the Federal level which do not. Equally, jurisdictions such as Western Australia where the de facto relationships of lesbians and gay men receive equal treatment² with heterosexual de facto relationships in all areas of state law sets up a further symbolic contradiction between states. Certain requirements and categories of definition in the PRA, which conflict with the lived experience of lesbians and gay men also serve to justify this claim of contradiction. For example, categories such as shared bank accounts, shared bedrooms and the recognition of couples by families and communities, which form an indicative list within the

² Under the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)*.

legislation of characteristics of a de facto relationship contradict the experiences of many lesbians and gay men. Finally, the desires of lesbians and gay men in terms of legal recognition, protection, rights and obligations do not necessarily correlate with those contained in the PRA, setting up a further level of contradiction. For example, the desire of lesbian couples to adopt children, or to have a co-mother as a presumptive parent on a birth certificate or the desire to have a same-sex partner nominated as a beneficiary on a superannuation fund are primary experiences which contradict the adequacy of the scope and type of legal rights contained in the PRA.

The implications of a contradicted symbolic legal figure are many and varied. At the theoretical level they are measured in the discussion of deviance and homosexuality above. The law however, also impacts directly on people's lives. These impacts are measured by an analysis of interviews with women in long term lesbian relationships which indicate that the contradictions in legal recognition cause a general sense of unease and distrust of the law. Further, these contradictions impact directly on decisions such as bringing children into a relationship, the purchasing of property and the level to which people publicly acknowledge their sexuality. Jean Curthoys has argued a need to "take...contradiction seriously and explore its effects" (1997: 8), in an endeavour to take theory towards maturation. This is a position however, that traditional liberal democratic approaches to law are unable to pursue since law is rendered an infallible truth. The inconsistencies contained within law, I will argue are either glossed over or rendered irrelevant to macro-level theorising.

The lesbian outlaw, comparatively, takes contradiction as the starting point and impetus for theoretical engagement. Throughout the thesis I develop the lesbian outlaw in this way and argue that it as a better framework with which to analyse laws and legal systems as they effect lesbians (and to a lesser extent, gay men). The lesbian outlaw is a feminist framework for this particular reason. It focuses on the lived experience of women's lives and deconstructs the treatment of women within dominant discourses. The lesbian outlaw is also a feminist framework, and I employ it as such, because of its affinity with issues rendered marginal or 'other'. The development of second wave feminism since Simone de Beauvoir has been concerned with woman's position as other. My contention is that the PRA, in constructing lesbians as deviant, also constructs them as 'other' and as such is in need of feminist theoretical investigation. The lesbian

outlaw is discursively fluid and draws knowledge from 'othered' discourses and power/knowledge regimes. I will argue for this knowledge to be 'taken seriously'.

This thesis also relies heavily on Foucaultian theory to support my use and understanding of the lesbian outlaw. There are a number of tensions between the works of Foucault and many feminists. Feminist debates for example, have critiqued Foucault's conceptualisation of power because it appears to deny the possibility of systematic repression that feminist theories of patriarchy have conceptualised (McLaren, 1997: 7). However, as Caroline Ramazanoglu has discussed, the tensions between Foucaultian and feminist ideas are not insurmountable and can, indeed be productive (1993: 2). Although on the surface, the two versions of power appear different, the similarities and conjunctions, are overt at the levels of both, intent, as discussed above, and in their enabling potential. For example, both feminist and Foucaultian accounts of power seek to legitimate knowledges that are non-mainstream. These conjunctions of intent and potential are precisely what I am seeking to uncover in the quest for feminist Foucaultian tools that may enable the analysis of the PRA that I have proposed. A Foucaultian enhancement of the lesbian outlaw provides a level of theoretical stability. Images of the lesbian outlaw exist in piecemeal studies and pursuits, and are most often presented as a standpoint rather than a theory in and of itself or a tool of analysis. By illustrating similar notions contained in both outlaw theory and Foucault's works, the theoretical foundations are stabilised. Further, the well articulated theoretical tools Foucault's work provides can aide the articulation of an outlaw theory, since the parallels between the two are so marked.

Having outlined the theoretical and legal elements of the thesis, I want now to make comment on the terminology that forms the basis of the thesis.

Notes on terminology

This thesis relies on a number of key terms that need clarification from the outset. The first of these is law. Law and legislative systems are conceptualised in this thesis on a three tiered system: as a practical project of enabling and prohibiting; as a codification of licit and illicit; and as a symbolic system which reflects ideal types of both people and their interactions with each other. In doing so, it relies on a notion of the law as a

discourse. Zillah Eisenstein argues that reading law as discourse renders the focus of enquiry towards the processes of laws rather than the actual laws themselves. She says:

... the study of law as a discourse is not limited to specific laws or to the activity of litigators; rather it is the study of these laws as they operate as symbols for what is legal, honourable, natural, objective, and so on. In this sense the symbolisation of law is more than its specific language (Eisenstein, 1988: 43).

An understanding of law in this way rejects readings of the law that do not account for the symbolic roles law plays. This is particularly important when considering the position of lesbians and gay men in law. Foucault requires that we understand the binary systems of ordering that dominant discourses, such as law, rely on in order to function (1980a: 83). Primary of these is the norm/ deviant binary which is of particular relevance to analyses concerned with lesbians and gay men since, Foucault argues, homosexuality is constructed as deviant in such discourses (Foucault, 1980a: 101; Horrocks, 1997: 90). Any understanding of law that does not account for the role and importance of symbolism, similarly then, does not account for the significance of law in determining and disadvantaging lesbians and gay men.

The other key term used throughout the thesis that may be ambiguous without explanation is lesbian. The focus is on the role that legislation plays in the lives (and possible lives) of lesbians within NSW. As such, it employs an understanding of lesbian as legal category and as a sexual identity. I am conscious here to avoid essentialist notions of lesbian and although I cannot talk on behalf of all lesbians, or address the diverse range of legal issues and concerns that individual lesbians may have, I do insist on a diverse and self identifying notion of lesbian. Ruthann Robson expresses this type of definition: "I think Cheryl Clarke may have said it best: "A lesbian is a woman who says she is." Although this formulation still has problems...it nevertheless provides a starting point" (1992: 21). Indeed, as my interview process will indicate, this was the type of self measure that I have employed throughout the thesis.

This thesis is also a theoretical exploration and relies, too, on a discursive understanding of lesbian. E. Hammond describes this understanding in relation to her work on race and sexuality: "Black lesbian sexualities are not simply identities. Rather they represent discursive and material terrains where there exists the possibility for the production of speech, desire and agency" (1997: 181). This thesis then, relies on an understanding of

lesbian in this way in order to call on the power/ knowledge relationships that emerge from the interactions between lesbians and other discourses such as law.

Having explained these bases of theory and practice that make up the thesis, the remainder of this Introduction outlines the argument in each chapter.

Chapter Overview

Chapter One: This chapter argues that liberal democratic approaches to analysing and explaining legislative systems are insufficient tools with which to explore the PRA. Primarily, this is because the language and tools of analysis found in this type of theorising are not sufficient to articulate the complicated and contradictory nature of this piece of legislation. In essence this is because liberal democratic notions such as equality and rights claims fall short of articulating the partial protection offered by the PRA and are inadequate in explaining the heterosexual bias that the PRA reinforces. This chapter poses liberal democratic readings of the PRA against a governmentality based understanding of the legislation and in doing so, establishes the need for theoretical tools of analysis that can comprehend both the enabling and controlling mechanisms apparent in the PRA.

Chapter Two: This chapter introduces the theoretical framework of the thesis. It brings together feminist incarnations of the outlaw, with a particular emphasis on the lesbian outlaw, and explores the usefulness of such a figure in socio-legal critique and theorising. This chapter argues that although a useful figure, the lesbian outlaw is markedly under theorised and as such, a symbiosis with Foucaultian theory is proposed.

Chapter Three: In this chapter, the process of developing a theoretical rigour for the lesbian outlaw commences. It discusses the similarities between the characteristics of the lesbian outlaw described in the previous chapter and Foucault's work, particularly in the areas of sexuality and governmentality, which is framed in itself as a critique of liberal democracy. In doing so, this chapter develops two key tools of analysis for use throughout the thesis- those of truth and silence. Truth is posed as plural in nature and silence is considered as a part of the speaking process rather than as the binary opposite of talk. The contradictions inherent in these tools, is proposed as an ally to the type of

theoretical analysis of the PRA proposed in the two previous chapters. This theoretical analysis is characterised as one that employs the lesbian outlaw.

Chapter Four: This chapter marks the beginning of a five chapter implementation and exploration of the lesbian outlaw in an analysis of the PRA. This chapter specifically analyses the text of the PRA itself and the historical conditions that brought about its creation and passage through Parliament. It argues that the PRA constructs a symbol of the newly enabled homosexual being who is marked by deviance since the PRA gave only limited rights to lesbians and gay men in long term relationships. It examines the reasons behind the persistence of the legal truth of homosexuality as deviant even through a process of enabling and in doing so, examines too, the outlaw truths that are necessarily dismissed in this process.

Chapter Five: This chapter analyses the parliamentary debate surrounding the PRA. Linking the chapter to the previous one, it makes an argument for the envisioning of the parliamentary debate as illustrative of the negotiation process of the new legal truth- the deviant homosexual being- found in the PRA. This chapter explores the specific process of negotiation involved producing, naming and characterising this new being. It argues that, in the main, the primary prompt for speaking in parliament was to foreshadow an other truth- the lesbian outlaw- that the PRA brought into view. It then argues that the negotiation process of the PRA was one which aimed specifically to silence this possible truth and maintain the given order of liberal democratic rationales.

Chapter Six: The process of negotiating the PRA is examined again in this chapter through an analysis of the interpretation of the PRA in the media. The chapter looks at the ways in which the PRA was spoken into its public incarnation and also considers the nature and purpose of a relative silence the media maintained over the passage of what could have been expected to be a remarkably controversial piece of legislation. The purpose of this analysis chapter is to look at both silence and chatter- not as binaries, but as simultaneous elements of the same project. It argues that the media attempted to rationalise the PRA within a framework of incremental equality which is fraught with contradiction. This chapter examines the ways in which incremental equality can be re-read as the lesbian outlaw and suggests that again, the interpretation and presentation of the PRA was put in place specifically to obscure the truth of the lesbian outlaw.

Chapter Seven: This chapter is based on a series of semi-structured interviews with women in, or previously in, long-term lesbian relationships. The interviews were designed to establish a comparison between legislation as it appears in codified Acts, and legislation as experienced by the people for whom it has been designed. This chapter specifically examines the characteristics of a relationship as defined in the PRA and compares it to the characteristics expressed in the interviews. It concludes that the definition does not fit many lesbian relationships. The chapter characterises the alternative relationship patterns lived out by women in lesbian relationships as a type of lesbian outlaw knowledge. It argues that this misfitting description contained in the PRA is yet another example of the way in which the knowledge of the lesbian outlaw is silenced through the PRA.

Chapter Eight: This chapter builds on the supposition of the previous chapter and interrogates the alternative relationship patterns found in the interviews. It argues that these patterns are quasi-legal, which is a classic lesbian outlaw position. The chapter explores these quasi-legal interactions for the clues that they might hold in understanding desirable interactions between lesbians and legal systems. It argues that lesbian outlaw discourse is better able to describe and facilitate these engagements than are traditional liberal democratic rationales. As such, it proposes the incorporation of lesbian outlaw discourse into legal theorising and practice involving law reform for lesbians.

Chapter One

The Legislative Bind:

Framing the issues

The discourses which particularly oppress all of us, lesbians, women, and homosexual men, are those which take for granted that what funds society, any society, is heterosexuality. These discourses speak about us and claim to say the truth in an apolitical field, as if anything of that which signifies could escape the political in this moment of history, and as if, in what concerns us, politically insignificant signs could exist.... These discourses deny us every possibility of creating our own categories. But their most ferocious action is the unrelenting tyranny that they exert upon our physical and mental selves (Monique Wittig, 1992: 24-25).

1.1 Introduction

The PRA instituted what was at the time, the furthest reaching recognition of lesbian and gay relationships in Australia. Its passage however, did not equate with an end to legally sanctioned discrimination against lesbians and gay men in New South Wales. This chapter argues that liberal democratic approaches to analysing and explaining legislative systems are insufficient tools with which to explore the PRA. Primarily, this is because the language and tools of analysis found in this type of theorising are not sufficient to articulate the complicated and contradictory nature of this piece of legislation. In essence this is because liberal democratic notions such as equality and rights claims fall short of articulating the partial protection offered by the PRA and are inadequate in explaining the heterosexual bias that the PRA reinforces.

This situation is one typically levelled at liberal democracy. Feminist jurisprudence in particular has identified a masculine and heterosexist bias within the functioning of liberal democracy in laws, legal systems and legal processes. This draws a particular contradiction between the liberal democratic 'citizen' who is restrained only in cases where the liberty of others is under threat, with women and more particularly lesbian women, who are restrained also on the basis of their sex and sexuality. This function of contradiction is not specific to these areas however. Liberal democracy is in itself inherently contradictory being a combination of liberalism and democracy which contain antithetical elements. As an exploration using Foucault's work on governmentality and the literature that expands on governmentality, will indicate,

liberal democracy is further founded in contradiction because of its dualistic function to both enable citizens and to bring them within a system of population management.

These contradictions are pivotal to understanding the function of liberal democracy at the levels of the theoretical, the symbolic and as a lived experience. However, liberal democratic theory and more generally, liberal democratic discourse appears unable to address this contradiction, reconciling it within generalised terms and ideals. As such, the adequacy of liberal democracy to explain such an example as the PRA is brought into question with the resulting quandary of how contradiction may be accounted for and what implications this may have for liberal democratic theory and the function of laws, legal systems and processes.

1.2 Establishing the Problem

From liberal democracy we inherit the notions of equality, rights and justice, which prompt and justify the type of legislative reform processes described in the Introduction. Liberal democracy describes a form of social and political organisation where democracy (majority rule) is tempered by guarantees of certain universal rights and freedoms stemming from liberalism (Hindess, 1996b: 66-7). Liberal democracy is a term that is used to describe a number of things- social and political systems, governmental organisation, theoretical frameworks and discourse. I am employing liberal democracy in the latter two ways. As a theoretical framework liberal democracy offers explanations and ideals for social interactions and acts to justify certain social relationships and activities. Although there is no unitary theoretical description of liberal democracy, there are a number of key similarities that mark the various theories (discussed throughout this chapter). As a discourse, liberal democracy represents a particular way of formulating power and knowledge. Chris Weedon defines discourse as: "ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them" (1987: 108). There is a key differential between these two versions of liberal democracy: whilst theory attempts to explain, discourse acts to create. I will examine both these notions of liberal democracy as they pertain to the development and interpretation of the PRA.

As a part of Australia's reform process for the guarantee of legal rights and freedoms for lesbians and gay men, the PRA has been prompted and interpreted through liberal democracy. Literature discussing the PRA is scant and the majority is articulated within legalistic frameworks: articles appear in legal journals and are authored by legal academics and practitioners. The most overt indication of this liberal democratic framework of interpretation is the type of description offered by this literature. The PRA is variously heralded as "at the vanguard of rights for gays and lesbians" (Shaw, 1999: 247); "turning the tide toward equality" (Millbank, 2000: 61) and "a major human rights reform" (Millbank and Sant, 2000: 218). Such interpretations rely heavily on liberal democratic notions such as those of equality and rights (the effect of the language of rights and equality on understandings of the PRA is discussed further in Chapter Six). What is clear from the language of the texts is that the PRA is being interpreted within specific liberal democratic rationalities- both in terms of its historical and social significance ("at the vanguard" and "turning the tide") as well as its intent (equality and human rights assurances and provisions).

This is further evidenced in the language used to describe things such as parenting issues, where the PRA fails to accord same sex de facto couples any recognition at all. Such downfalls are rationalised as omissions and overt acts of discrimination. Millbank and Sant for example, argued of the PRA:

the very limited recognition of the relationships of children with their non-biological lesbian and gay parents is likely to be a source of continuing disadvantage to those children and their families...Basic formal equality is still not present in a number of areas, with, for instance, discriminatory superannuation and age of consent legislation (2000: 219).

Alternatively, the failure to recognise same sex parenting claims may be rationalised as elements yet to be brought into the fold through a strange notion of incremental equality (discussed further in Chapter Six) whereby future rights that would accord 'equality' are held to be implicit in the passage of some rights and partial recognition. NSW Attorney General Jeff Shaw for example, argued: "This is innovatory legislation. It may need fine tuning. But its fundamental, non-discriminatory principle is unassailable" (1999: 248). Claims of discrimination call on liberal ideals of rights and equality and in the case of claims made on behalf of minority groups, call too on liberal cautions against majority tyranny overriding specific freedoms (Mill, 1974: 62). This rationale gives the image of

the legislation as fitting comfortably within the ideals and functioning of liberal democracy.

However, as the following fictitious scenario,³ indicating the potential effects of the PRA on a lesbian couple suggests, the language of rights, equality and freedom appear somewhat inadequate when explaining the PRA in action:

Jill leaves for work at the local high school, saying as always, goodbye to Beth, her partner of some ten years. On a pedestrian crossing near the school, Jill is hit by a speeding car and killed. Under the Compensation to Relatives Act 1897, Beth is able to sue the driver of the car for Jill's wrongful death. She will inherit Jill's estate claiming as her *de facto* partner under the Wills, Probate and Administration Act 1898. In the absence of a written preference, she would be able to consent to Jill's corneas being donated for transplant under the Human Tissue Act 1983. However, although Jill's school had always acknowledged Beth as her partner, inviting her to staff functions as such, she has no actual legal recognition under the Property (Relationships) Act 1984. Beth cannot inherit the balance owing of Jill's unpaid long service leave. The invisibility of their relationship is not new. When Beth gave birth to their son six months earlier, Jill took sick leave to be with Beth at the hospital. She had been ineligible for parental leave from work. This lesbian relationship, governed by the new Amendment Act, appears somewhat like walking through shadows. Now you see it, now you don't (Cahill, 2000: 26).⁴

In this example, the PRA is presented as a series of contradictions rather than a process of equitable legal treatment or even the process of rights acquisition. It illustrates contradictions of the PRA as specific examples of liberal democracy in action. The contradiction is tangible in the legislation itself. The contradiction is also tangible at the more immediate level of function and effect for Jill's partner Beth. Because of this contradiction, Beth is denied some aspects of legal recourse and protection that a heterosexual *de facto* partner would be granted given the same circumstances. The manifestation of this legislative contradiction is, arguably, injustice, a deficiency of human rights and indicative of a lack of justice and freedom. Beth will not only need to contend with the loss of a partner and co-parent. She will also face a legislative nightmare of partial recognition and, like so many of her predecessors, the choice between accepting this legal invisibility or embarking on some legal based challenge to it- at great personal and likely financial cost.⁵ And yet, as indicated earlier, the PRA has

³ Although this scenario is fictitious, it is based on legal precedent and on points raised by gay and lesbian lobby groups when arguing the need for relationship recognition in law. See Chapter Four for more detail. Further, the concluding image of the legislation being like walking through shadows is similar to the experiences of the PRA articulated by women interviewed for this thesis. See Chapters Seven and Eight for an exploration of this.

⁴ This example also appears in Cahill, 2001.

⁵ There are a number of instances where this has been the case. The most often cited case, perhaps because it was the first that attracted widespread public support from lesbian and gay organisations, was

been presented through liberal democratic rationalities without regard to such effect. At this point I am prompted to explore the PRA and its implications using a framework that is better capable of exploring this condition and effect of contradiction.

Contradiction, "the proposition that something is both the case and not the case at the same time" (Jary and Jary, 1991: 118), is most often a state that theory and theoretical pursuits aim to avoid. The successful formulation of theory is measured first by its internal logic (that is, the absence of internal contradiction) and then by its utility and applicability. This is demonstrated in the example of literature interpreting the PRA using liberal democratic rationales. Downfalls in the legislation (such as those indicated in Beth's example) are rationalised as anomalies that will eventually be swept up into this passage towards equality, rights and freedom for lesbians and gay men. Beth's situation is one of discrimination (measured against the norm of equality) rather than contradiction (measured by her ability and inability to act within the law). In the moment that Beth experiences the PRA however, the first of these descriptions is inadequate. Certainly, Beth is experiencing discrimination- a heterosexual partner would be able to access Jill's unpaid leave entitlements and would be a presumptive parent of their son. However, discrimination is only an adequate description when this lesbian relationship is considered against a heterosexual relationship in law. When there is nothing to compare it to, when the lesbian relationship is considered on its own however, discrimination cannot be used as a description since there is no relative measuring post. The contradiction is that the law treats Beth both as Jill's partner with the entitlements due to partners and as NOT Jill's partner, and so lacking any entitlements owed partners. That Beth can access compensation laws but not parenting laws as a lesbian is a contradiction of law rather than an act of discrimination- Beth cannot experience discrimination against herself. Discrimination always renders lesbian relationships secondary to heterosexual relationships- lesbian relationships become analogous to 'normal' heterosexual relationships rather than being normal in and of themselves.

the American case of Sharon Kowalski and her partner Karen Thompson. In 1983 Sharon was injured in a car accident. Her partner of four years, Karen, spent the next seven years battling court cases to be appointed Sharon's legal guardian. Eventually an appeal process saw this happen, however it had cost the women a great deal- including seven years and over \$US300 000. Gianoulis, Tina. (nd). See Chapter Seven for further discussion of this case as it arose in the interviews for this thesis.

Throughout the following chapters I will argue that liberal democracy establishes contradictions such as those experienced by Beth however, as it lacks the ability to express this contradiction, so too does it lack the ability to consider the implications of it. Foucault argues that legislative discourse (which is framed by liberal democracy) is implicitly contradictory in its function since it acts to enable populations and to manage them simultaneously. Through his works on governmentality Foucault calls for an understanding of government as a series of strategies and technologies for regulating the conduct of others (Foucault, 1987: 337) masking a “margin of liberty” (Foucault, 1988: 12) where resistance can occur. For Foucault, government is primarily the management of society (Foucault, 1991b: 94)- a very different interpretation of society than the one offered by liberal democracy where liberty is forefront. He describes it:

I was concerned not with some omnipresent power... but with the refinement, the elaboration and installation since the seventeenth century, of techniques for “governing” individuals- that is, for “guiding their conduct”- in domains as different as the school, the army, and the workshop... Accordingly, the analysis does not revolve around the general principle of the Law or the myth of Power, but concerns itself with the complex and multiple practices of ‘governmentality’ which presupposes, on the one hand, rational forms, technical procedures, instrumentations through which to operate and, on the other hand, strategic games which subject the power relations they are supposed to guarantee to instability and reversal (Foucault, 1987: 337).

Foucault’s work on governmentality does not deny liberty rather it establishes this contradictory dualism of enabling (through laws such as the PRA, for example) and managing (through the restriction of access to the margin of liberty). This will become the central problematic of my theoretical argument throughout the thesis- to account for the fact that governmentality necessarily complicates liberal democratic interpretations of the PRA and that some understanding must be made of the contradiction that it highlights in this piece of legislation. To preface this discussion however, it is necessary to understand in greater detail, the core theoretical frameworks of liberal democracy and governmentality.

1.3 Liberal Democracy

Liberal democracy is best understood by considering liberalism and democracy as separate terms and then understanding the conjunction of the two in liberal democratic discourse. The foundation of liberalism gives liberal democracy ultimate ideals and concepts such as freedom and liberty, rights, equality and justice (Plattner, 1998;

Simon, 2002). I am referring here to a notion of classical liberalism,⁶ that is, the traditional ideology where the assurance of freedom from state control or illiberal communities, and individual rights are paramount alongside a notion of limited governance to protect these ideals. This is as opposed to political liberalism, representing conservative political views; libertarianism, with emphasis on the minimisation of laws to guarantee greater individual freedoms; and neo-liberalism,⁷ which has as its focus the maximisation of economic freedoms (Kymlicka, 1990; Duggan, 2003). Such terms relate to the 'ideal' or the 'natural' state- that is the state of being prior to the law. John Locke, in 1690 described this as "a state of perfect freedom" (Locke quoted in Plattner, 1998), that is, "freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man (sic)" (Locke, 1690).⁸ According to Locke, the only acceptable limiting factor on this state of liberty was to protect each individual against subjection to the arbitrary authority of others:

But Freedom of Men under Government, is, to have a standing Rule to live by, common to every one of that Society, and made by the legislative power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man...

Limiting factors on liberty however, are not uniform in all discussions of liberalism (Wertheimer, 2002; Kymlicka, 1990 and 1995). John Stuart Mill's 1859 "Harm Principle"- "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent the harm of others" (re.1974: 135) develops Locke's limitations on governmental authority. It draws commentary even today, with authors criticising the applicability, relevance and implications of such principles (Wertheimer, 2002). Hence, even the foundation stone of liberalism, the 'ideal' state of freedom, is fraught with contradiction. The ultimate states of liberty are conditional and in need of temperance.

⁶ For a good description of how classical notions of liberalism differ from liberalism as Foucault utilises it in discussions of governmentality, see Burchell, 1996 and Rose, 1996.

⁷ Foucault discussed neo-liberalism in relation to post-war Germany and in relation to the Chicago School, during his lectures at the College de France within the same time period as his discussions of governmentality, which is discussed below. For an analysis of how these two sets of ideas correspond and coincide, see Lemke, 2001.

⁸ These quotes come from Locke, John (1690) *Second Treatise on Government*. An electronic version of this text is available at: <http://www.swan.ac.uk/poli/politics_html.htm> (Accessed 24/09/04). Unless otherwise specified, all Locke quotes in this chapter come from this source.

Democracy is one such form of governance that provides these physical conditions and temperance within the public sphere,⁹ through its directives of populace governance and "universal adult suffrage and eligibility to run for office" (Plattner, 1998). Democracy functions to make assurances for the populace. Ann Cudd argues: "Ideally, then, democracy promotes rationality, autonomy, equality, dignity and diversity, and is justified to the extent that it is the best means to do so" (2002: 107). That is, democracy provides the material conditions for participatory governance of the public sphere. She notes however, that this in and of itself is potentially contradictory in application: "These can be competing criteria; indeed, some might argue that in the context of democracy the competition among these criteria is inevitable. Persons may see their interests best furthered by the denial to others of autonomy or equality" (2002: 107). Given this, liberalism and democracy are a complicated duo. The principles of democracy act to apply the ideals of liberalism however they also contradict them in a number of cases as Cudd suggests. This has long been considered a fraught collaboration. Mill for example, warned against democracy because of its potential "tyranny of the majority" (Mill, 1974: 62). That is, the majority rules rationale that has the potential to adversely limit individual (minority) liberty.¹⁰ Although functional, democracy is inherently contradictory to liberalism in a number of instances.

Liberal democracy then, is both the implementation of liberal ideals and the temperance of the same. The ideals of liberal democracy (freedom, liberty, rights, equality, justice) are ultimate terms,¹¹ in that they exist in the 'ideal', or the 'natural' state. Their guarantee, however, is both procedural and conditional. The democracy element must work to assure the liberal ideals to the individual and to provide the conditions for the limitation

⁹ Liberal democracy situates this coverage within the public realm. In the ideal of liberal democracy the private realm should be where liberty functions without direct interference. This of course, is contradictory in and of itself. In effect, the state constantly imposes on the private sphere (domestic violence regulations for example) and liberalism gives the foundational arguments to facilitate it (the Harm Principle in this case). The idea of the public/ private divide will be taken up again later in this chapter. For more detailed discussion see: Kymlicka, 1990. See particularly his discussion on feminism in Chapter 7.

¹⁰ Deliberative Democracy has been one theoretical/ political movement formulated to eradicate such potential downfalls. For discussion see: Fishkin, 2002. Also interesting are the discussions of pluralism, representation and liberal democracy. See Weinstock, 2002.

¹¹ Or at least, appear as such. As my later discussion of feminist explorations of these terms will illustrate, they are not so easily conceptualised in this way, being gendered, sexualised and implicitly raced amongst other things. This furthers my argument that liberal democracy is foundationally contradictory.

of liberty for the good of the populace. This contradiction between liberty and temperance is essential to accord function but its appearance is the potential to unravel the ideal state. As my later discussions on the contradictions associated with the terms equality and rights will indicate, there is a precarious balance between the need for ideal states to articulate conditions and expectations, and the recognition that these ideal states are not material effects. Liberal democracy functions, in the main, *towards* ideal liberal states and that in doing so it obscures the procedural contradictions necessary to its function. This produces a series of functional contradictions- that is, contradictions that exist but that are consumed within the function towards liberal democratic ideals. For example: the tension between individualism and the collective good;¹² the assumption of a delineated public and private sphere;¹³ the assumption that rights unproblematically enhance freedom;¹⁴ the assumption that democratic debate is accessible to all people;¹⁵ the assumption that rights are unbiased;¹⁶ the assumption that democracy ensures the eradication of the "tyranny of the majority"¹⁷ and so the list continues. Each of these assumptions is and has been debatable. Similarly, each assumption is part of what characterises the function of liberal democracy and what enables liberal democracy towards liberal ideals.

¹² This is the basic "paradox" of liberal democracy as Chantal Mouffe (2000) describes it. See too my later discussion in this chapter.

¹³ The problems of contradiction found in defining, maintaining and legislating these two spheres has been a focus of much second wave feminist literature. See for example, MacKinnon, 1987; Thornton, 1995.

¹⁴ Criticism of rights talk can be found in a number of feminist works, the essence of which suggests that rights claims can be polarising and divisive, and may not in actual fact represent the best interests of the claimants. Didi Herman for example, argues that legal discourse may "colonise" rights claims and in doing so may obscure the original intentions of the claim. This will be discussed further in this chapter and again in Chapter Six. See for discussions: Herman, 1993. Cited in the same work, see Smart, 1989. See too Robson, 1992. See particularly her critique of the rule of law in Chapter 1.

¹⁵ Will Kymlicka provides an interesting, optimistic position on the coalition of minority rights and liberal principles. He argues that minority groups (in this case cultural) can represent their specific interests within liberal democratic frameworks for debate so long as they subject to the same limiting principles of liberal democracy that everyone else is subject to such as liberty and justice. See Kymlicka, 1995. Conversely, many other theorists, particularly feminists, have argued that liberal democratic debate often entails the use of abstract and biased notions that do not reflect the reality of women's experiences. In this way, the actuality of women is excluded from liberal democratic debate. See for discussion of this contradiction: Ahmed, 1998. For discussion of how new social movements (such as lesbian and gay movements) have attempted to highlight the silencing of minority views from such public debate see for example: Smith, 1999. See particularly her Introduction.

¹⁶ For an interesting discussion of Australian legal terminology and heterosexual bias see: Chapman, 1996. A broader discussion of this bias of legal language and its relationship to gay and lesbian rights can be found in Miller, 1998.

¹⁷ Many theorists for example, comment that law reforms (the basic assurance of liberal democratic rights and claims for equality) are not sufficient to ensure the eradication of homophobia and heterosexism (arguably one of the biggest tyrannies of the majority that lesbians and gay men face). See for example: Bamforth, 1997. See particularly Chapter 8 on "The limits of law and law reform."

What this amounts to is the obscuring, or the inability of liberal democracy to admit contradiction. There are many implications that stem from this situation, which will be discussed in relation to the PRA throughout the thesis. The essential trend to these is that the obscuring, or the inability to admit contradiction within liberal democratic discourse leads to two specific failures. First, it leads to the failure to fully articulate the productions of liberal democratic discourse, such as the PRA, which are characterised by this contradiction. Second, it leads to the failure to be reflexive on implication and meaning of these productions. When liberal democratic discourse refuses to admit contradiction, it amounts to a refusal to consider the implications of contradictions in effect through discursive constructions. This thesis will explore the implications of the PRA establishing contradictory relationship recognition for people in same sex relationships, such as the recognition of a lesbian couple for the purposes of intestate wills but not for the purposes of superannuation inheritance. It similarly amounts to a refusal to consider the meanings that are associated with this contradiction other to liberal democratic discourse. For example, the thesis will examine meanings given to the above contradiction by women in long term lesbian relationships. What follows in the remainder of this chapter is an exploration of these effects that stem from the obscuring, or the refusal to admit contradiction within liberal democracy. This is a central concern that will be taken up in specific relation to the PRA, and in greater detail throughout the thesis.

1.4 Contradiction and Liberal Democracy

The specific multi-faceted manner in which I am portraying liberal democracy in this critique is important to understand. To do this, I want to distinguish between two purposes for employing liberal democratic ideals- theoretical purposes and 'in practice' purposes. When I talk about the theoretical purpose of these ideals, I am talking about the use of concepts such as equality and rights to examine the functioning of social systems. Obviously feminist and other similar 'group' based theorising has found articulation through these terms. Further, a political snowball effect of rights based social movements can be traced. This is significant to recognise since lesbian and gay rights movements, prevalent from the 1970s onwards in most Western countries, took their cues primarily from other rights based movements (second wave feminism and

civil rights movements for example) (Kaplan, 1997; Smith 1999). When I am talking about these ideals 'in practice', I am taking a multi-faceted view of what this means. There are the in practice versions of freedom and liberty which prompted a plethora of social gains from the end of apartheid in South Africa, to smaller scale legislative amendments such as no-fault divorce laws and anti-discrimination legislation. However, like many other feminist scholars before me (MacKinnon, 1983; Pateman, 1988; Jeffreys, 1993; hooks, 1994), I want to assert that the practical realisation of ideals such as equality, have intrinsic limitations stemming from the social systems within which they function such as racism, sexism and homophobia, rife even in twenty-first century liberal democratic countries. Aligned with this statement, I would also assert that formal equality and equality as a practice are not one and the same (Kinsman, 1987; Herman, 1993), although the latter is less the focus of this inquiry. The purpose of these assertions is not only to orientate this inquiry theoretically, but to argue that there is no one sense of equality, or any other such ideal term, to which I am referring. This argument will necessarily combine the different understandings, but at times will also separate them and articulate the friction that often arises between the two. For example, the PRA will be considered both as an achievement of rights based activism as well as a failure of the ideals of liberal democracy and the tensions between these two understandings will be explored throughout all of the chapters.

The critique of liberal democracy therefore, is not a new exercise. Since it has been employed across the political spectrum however, it is important to clarify my intentions from the outset, and to situate this work firmly within leftist traditions of critique. In particular, the mode of critique found in the thesis takes its cues from the philosophical works of Chantal Mouffe and Ernesto Laclau on radical democracies (Mouffe, 1992; Laclau and Mouffe, 2001). Although not primary texts of the thesis, there are two key reasons for favouring this framework. Mouffe and Laclau articulate and interrogate the limits of liberal democratic ideals¹⁸ and the types of hypocrisies that arise in their real life applications. This indeed is a quest shared by many other traditions- feminist jurisprudence, and many black feminist writers in particular, have made significant inroads into the exploration of these contentious issues (Jhappan, 1998: 63). Most

¹⁸ Or liberal democratic *principles* as Evelyn Kallen discusses them, identifiable "prior to law" (1996: 207), forming standards and guidelines to which laws and governments should aspire and simultaneously articulating the *subjective* nature of these principles in practical application (1996: 206-7).

importantly however, and in the second instance, such a critique is actively indebted to the many benefits and achievements gained through the pursuit of such imperfect ideals. As Mouffe points out, without the notion or language of rights claims, equality and liberty, major political developments over the twentieth century are likely to have been stymied (Mouffe: 1992: 2). Certainly, the majority of positive gains made in the area of lesbian and gay legal rights are intrinsically indebted to these ideals. However, as Mouffe notes, this debt of benefit should not preclude an exploration also of limitations (1992: 3). Enquiries such as this have the aim of radical democratic theorising, which is not designed to bring about the downfall of liberal democracy, but rather to expand and develop the notions through critique. This thesis then, holds the gains of liberal democracy at the fore, and offers its critique of application in an attempt to broaden current understandings and to suggest theoretical avenues to further the realisation of these essential social notions (justice, equality, liberty).

Mouffe has argued that liberal democracy is inherently paradoxical¹⁹ since it entails the combination of liberalism (freedom for individuality) and equality (the need for things to be the same), which are irreconcilable (2000: 5). She argues further that neo-liberal rationalities have masked this paradox by presenting “common sense” middle of the road paths to walk between these competing notions, as if the negotiation process were somewhat self-evident (2000: 6). The result, she argues, is a de-radicalisation of political agitation and a corresponding fall in the agitation for true equality (2000: 6). Mouffe is correct in articulating ever present paradoxes in liberal democracy- the debates of definition are discussed above are evidence that this is accurate. Further, her concern regarding the relative invisibility of this contradiction is a legitimate one, and certainly a focus of the thesis. As I will elaborate throughout this work, contradiction is not a failure of liberal democracy but rather an insightful avenue of inquiry. The failure, as I see it, is in ignoring this contradiction and in doing so, relinquishing liberal democracy from responsibility for the difficult questions it poses. Identifying noble goals to which liberal democracy should aspire, is of little benefit if the pathway that could inform and shape those goals is not considered. Where I differ from Mouffe is in the purpose of locating the contradictions. I do not want to enter into the political debate of neo-liberalism (although its critique is a necessary one) so much as I want to explore

¹⁹ I am reading paradox here in line with contradiction as I have discussed it previously.

the theoretical significance these contradictions and the potential avenues of inquiry which open up when these are considered.

My critique of liberal democracy then, focuses on its essentially contradictory nature. Its aim is to articulate this contradiction and to explore the effects and significance of this contradiction. This second point is where my thesis diverges from more traditional critiques, which, as Mouffe argues, are focussed on the task of reconciling contradiction to ease the function of liberal democracy. My work, although in part designed to contribute to discussions on how liberal democracy does, can and should function, is aimed more at exploring the contradictions as irreconcilable than with reconciling them. I am interested in examining what the contradictions are, how they play out in the social realm, what significance they may have symbolically and what they may mean for future theoretical pursuits. There are two primary purposes in setting such a task. First, liberal democracy is a political as well as a theoretical concept, the impact of which is experienced by citizens of the state. Considering its contradictions is paramount in understanding and articulating the experiences of people within liberal democratic states. Secondly, there is theoretical gain to be made from exploring contradictions rather than treating them as glitches, problems in need of overcoming. Contradictions are telling of much more than failure- indeed, as I will use Foucault's work to illustrate throughout the thesis, they provide other avenues of discursive inquiry and add insight into the specific functioning and again, the experience of liberal democracy.

As mentioned in the introduction, Jean Curthoys has argued a need to take "contradiction seriously" (1997: 8). Her work on the Women's Liberation Movement has suggested that taking "contradiction seriously" is pivotal to the maturation of theory (1997: 8). She argues that contradictions emerging from the development and practice of the women's liberation movement were not formulated as key theoretical concerns and that as a result, potential theoretical coalitions and developments were cast aside. This is a process which she labels as "amnesia...the systematic and necessary forgetting of socially threatening ideas" (1997: 6). Contradiction in this sense, is "threatening" because it has the potential to disrupt the logic of theory by challenging the apparent sureness of theoretical foundations. However, Curthoys insists that contradiction need not be threatening and that its consideration has the potential to lead to a number of benefits that include the more intricate development of theoretical endeavours (1997: 8).

She argues too that: "if we do take it (contradiction) seriously...and follow through the twists and turns and distortions by means of which we try to cope with it, we can disentangle many of the intellectual, moral and political confusions which surround us" (1997: 8).

Whilst our works have different contexts, her central argument is insightful to the thesis. She suggests that tracing contradiction in social and theoretical contexts and examining the ways in which contradiction is abstracted or disregarded can reveal hidden significance to everyday situations, and aids in unravelling common confusions (1997: 8-10). Taking seriously means a number of things, the primary of which I will discuss below. Taking contradiction seriously means understanding its effects (political, social and individual) and being able to articulate them as legitimate experiences. Liberal democratic ideals are hard pressed to do this when they necessarily describe situations as discriminatory, un-equal or repressed- experiences all measured against a norm that marks equality and liberty. Similarly, it means being able to comprehend and articulate the symbolism of contradiction as it stands on its own not in relation to what it could be. This will be explored in relation to Foucault's notion of deviance in the next section. Suffice to say here that the contradictions the PRA establishes cannot be understood fully by rendering them simply a result of inequality. Finally, taking contradiction seriously requires an endeavour to understand its function within society and theory in general, separate to its nature as a by product or failure of a liberal democratic ideal. I want to argue that liberal democratic notions are too broad, too focussed on an ultimate end point (equality, justice, freedom, liberty etc.) to fully comprehend or articulate the complex and contradictory situations that their use necessarily entails. Contradiction in this situation is rationalised or identified only so that it may be overcome.

The very nature of liberal democratic ideals necessitates a type of rigidity that tends to preclude a thorough analysis of process. I take Foucault's work on sexuality as the prompt for this statement. Foucault calls into question notions such as liberation and freedom (Hunter, 1996: 144) when he argues that the repressive hypothesis diverts attention away from the questions of how and why sexuality is presented in a particular way (1980a: 12). The idea of repression, he argues, focuses attentions towards its usurpation- it generalises both the cause and solution into grand narratives, without

significant exploration of the discursive creations it is dealing with (1980a: 11). This is the point that my thesis takes up. Foucault's exploration illustrates that there is significant gain to be made from analysing what is rendered a given in liberal democratic discourse- repression and inequality for example- and asking questions of it other than how it can be usurped. What does it tell us for example, that lesbians and gay men are at the bottom of a legally sanctioned relationship hierarchy? Certainly it tells us that there will be experiences of discrimination because of it- Foucault does not deny such effects and the need for them to be overcome (1980a: 3). The point to be made is that this is not the only avenue of inquiry. The hierarchy also suggests more reflexive questions: what sort of social ordering system contributes to the creation of this hierarchy? Who is affected by this legal system and what are the experiences of these people within the hierarchy? What agency is there to resist repressive effects within the hierarchy? Further to these inquiries are accompanying questions of the quest for equality itself- who is articulating equality? Whose standards are used as the measure? The PRA instituted partial protection and recognition for lesbians and gay men in NSW and yet, as the thesis will explore, was articulated and interpreted with the logic of liberal democratic ideals, including equality. Certainly, it falls short of aptly describing the legal reality, the theoretical meaning or the actual experience of the PRA. Harnessing the contradictions and interrogating the processes involved in producing this situation, will produce a more thorough understanding of this situation.

I do not, however, want to seem to be saying that the persistent use of liberal democratic ideals, particularly equality and rights claims represents a naivety of theorists, legal workers or political lobbyists (Herman, 1993: 33). As Didi Herman claims, this is "somewhat unhelpful" (1993: 33), arguing that the optimism associated with such claims is not naïve, whilst cautioning for a fuller understanding of the limitations as well as the benefits of rights claims (1993, 26-33). Nor does it necessarily represent a blanket avoidance of the contradictory nature of these terms. In some instances, the justification for their use lies in the material benefits to be made from them. In other instances however, a more concerted effort is made to reconcile the purposes of these contradictions. Diane Miller for example, argues that even failed attempts at lesbian and gay legal rights and equality produce a dialogue that articulates the issues and lends visibility to situations such as discrimination (1998: 3). The contradiction between the expression of gay and lesbian rights and their failure to be produced within liberal

democratic societies is reconciled in the usefulness of the process. Whilst I agree with such a claim, I do not think that privileging the debates, which arise from the contradiction, is the same thing as taking contradiction seriously. Within these arguments, there is still a grand narrative of equality or rights, the debate is simply how to interpret or how to rationalise the contradictions towards an end goal, which is seemingly given.²⁰

Similar to this, although I am critiquing a rigidity of liberal democratic notions, I do not want to suggest that this is a totalising critique, applicable at all times. Certainly, there are limitations and contradictions to such an assertion. One such example of this can be found in the use of Canada's *Charter of Rights and Freedoms*. I suggest such an example, not because the Charter provides a statement of intent that Canadian law should function under the auspices of equality and freedom- the United Nations' *International Declaration of Human Rights* to which Australia is a signatory acts in a similar (although arguably less direct) manner- rather, because its principles have been applied with a flexibility that seemingly contradicts the rigidity I am speaking of. Since its inception in 1982, courts constantly interpret the Charter, setting precedents for flexible readings of equality and rights. For example, the Canadian Supreme Court interpreted s.15(1) of the Charter which reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(http://canada.justice.gc.ca/Loireg/charte/const_en.html)

to implicitly incorporate discrimination against lesbians and gay men as contrary to the equality it aims to ensure for all citizens (Rankin, 2000: 176). As Carl F. Stychin examines, such a process of interpretation necessitates a non-rigid structure for terms such as rights and equality, a certain fluidity and a conceptualisation of future flexibility to incorporate categories to these terms not yet imagined in current social systems (1995: 107-109). The other notable characteristic of the Charter is the obvious subjectivity that its application has entailed. Again, as Stychin argues, the interpretation of the Charter has necessarily involved an interpretation of intent to redress discrimination. In the particular instance, historical discrimination has been offered

²⁰ Even feminist debates about equality as sameness or equality as difference maintain the ultimate end point as equality. What it looks like is debatable, but its desirability or necessity is not questioned.

some redress under the Charter (Stychin, 1995: 108). Importantly, this redress is not simply determined in terms of recognition, but also in terms of compensation,²¹ which emphasises the subjective intent of 'equality' in the Charter. All of this noted however, the ideal of equality is still met in only partial terms throughout Canada, and the persistence of claims under s.15 is testimony to the incomplete and the still contradictory nature of equality and rights and other liberal democratic terms which the Charter offers to ensure.

Identifying these contradictions serves a direct purpose if we are to interpret the law as an enabling discourse. It illustrates downfalls of liberal democracy between intent and actuality and highlights potential problems in the lived experience of these downfalls. Both of these functions are acts that take contradiction seriously because they encourage analysis that fulfils the three requirements I outlined earlier- articulating the effects of contradiction, considering the symbolism of contradiction and examining the function of contradiction in society and in theory. As such, the thesis will take up the exploration of contradiction in the PRA in this manner. I have argued that the thesis aims to extend liberal democratic theory rather than criticise it. However, this process can be achieved without subjecting liberal democratic theory and practice to significant critique. Accordingly, the thesis challenges the adequacy of liberal democratic interpretations of the law as an enabling discourse, as found in the reportage literature on the PRA examined above. What I will argue throughout the remainder of the thesis is that the law and legislative discourse in general, must also be considered with a view to its function of managing the population. This key contradiction of intent and effect of legislative discourse then, is also considered in the thesis in an attempt to take contradiction seriously. This task, in the immediate situation, will be facilitated through the theoretical framework of governmentality posed by Foucault.

²¹ For example, the Ontario Court (General Division) findings in Rosenberg & CUPE v Canada compensated surviving same sex partners for their exclusion from the Canadian Pension Plan from 1998 by awarding them their full pension. At the time of writing, a court case based on this finding was in process to extend that compensation to surviving partners since 1985. Further information on this can be found on the Equality for Gays And Lesbians Everywhere (EGALE) web page: <<http://www.egale.ca>> (Accessed 27/09/04).

1.5 Contradiction and Governmentality

Liberal democratic theory and Foucault's discussions of governmentality both account for the function of laws and legal systems in developed, Westernised countries. However, there are marked differences between these two explanations, principally in their accounts of three key issues: freedom, and the processes of enabling and managing populations. These tensions are the ones I will focus on in this study. Prior to that however, it is necessary to discuss a more general understanding of governmentality as a theoretical and political concept.

Governmentality

Foucault developed the notion of governmentality in his later works and lectures at the College de France (Lemke, 2001). This work was incomplete and has since been taken up and furthered by other theorists, particularly Barry Hindess (1996; 1998a; 1998b), Mitchell Dean (1999) and Nikolas Rose (1992 (with Miller); 1996; 1999). Mitchell Dean argues that "(a) field like governmentality is necessarily a collective project, conducted in many places and from many perspectives" (1999: 2). What this means is that there are many interpretations and applications of governmentality, a range of emphases of key ideas and a tendency to explain the theory through application. For example, many theorists have developed governmentality to address the problems of governing in the twentieth century, examining a variety of political processes, particularly neo-liberalism (Rose and Miller, 1992; Barry, Osborne and Rose, 1996; Dean and Hindess, 1998 and Rose, 1999). Although this latter literature²² will be considered here, particularly to develop the key terms of governmentality used throughout this thesis, as outlined previously, the focus of governmentality will remain as a critique of liberal democracy rather than a further development of the recent literature regarding neo-liberalism and 'advanced liberalism' (Rose, 1999).²³

Governmentality emerges in Foucault's work as a continuation of ideas related to his earlier theorising on surveillance (1977) and power (1980b). These ideas are reformulated and refocused to the specific concern of modern practices of governing.

²² Referred to by Alan Hunt as neo-Foucaultian literature (1996: 167), indicating a significant break from Foucault's original works (more the focus of this thesis).

²³ See section 1.3 for a discussion of the line between liberal democracy and neo-liberalism and, in particular, for the rationale of the focus in this thesis on liberal democracy.

focused on problematising and managing populations (Rose and Miller, 1992: 181; Dean, 1999: 19; Rose, 1999: 21). Foucault's thesis of governmentality envisages law and legal systems as one discourse amongst many aimed at regulating populations. He argues that population management became a central concern of governments between the sixteenth to the eighteenth century and resulted in a "governmentalisation" (Foucault, 1991b: 87) of society. What this means is that governing populations became a pluralistic notion, discursively situated both within and without state apparatus. According to Foucault, modern forms of government have developed as processes of managing populations that differed from the traditional rule of citizens by the sovereign (Dean, 1999: 24-5)- what Dean and Hindess label as a "liberal view" of government (1998: 4).²⁴ This new form of government was characterised by a diffusion of rule. That is, the management of populations came not from a figurehead of state but rather, was dispersed amongst the population through a variety of apparatus and discourses.²⁵ These apparatus and discourses become the focus of governmentality, with an emphasis on how, to what extent and to what effect they manage populations towards set norms (Dean, 1999: 10; Rose, 1999: 75).²⁶ Linked in this way, to Foucault's ideas about sexuality (explored in greater detail later in this chapter), government is a process of creating norms and antithesis notions of deviant that construct and order populations and, as I will discuss in relation to freedom below, manage the liberty of individuals in the process.

Broadly speaking, Dean defines this new form of government by arguing that "government entails any attempt to shape with some degree of deliberation aspects of our behaviour according to particular sets of norms, for a variety of ends" (1999: 10). Government in this sense differs from traditional concepts of government as an explicitly political entity or simply a practice of the State (Rose and Miller, 1992: 176-8; Dean and Hindess, 1998: 2-4)- these understandings being the foundation of liberal

²⁴ They argue: "government [from the liberal view] is seen from the top down- that is, primarily as the work of *the* government and of agencies which it authorises" (1998: 4).

²⁵ Governmentality not only displaces the sovereign figure as a power base in the formation and practice of government, it also critiques analyses of government that focus on locating power bases rather than exploring how and why power is made to circulate in societies (Dean, 1999: 24-5). See later in this section for further clarification on this dual reading of governmentality.

²⁶ Nikolas Rose argues that norms are of such importance to governmentality that citizenship was based on an individuals' willingness and ability to adhere to "the norms of civility" (1999: 233). This discussion of norms and the deviant antithesis will be explored further below and then throughout this thesis with particular regard to homosexuality.

democratic discourse critiqued above. Government is rather, more diverse, ranging from the management of oneself or others, to "members of a household or of larger collectives such as the population of a local community or a state" (Dean and Hindess, 1998: 2-3). According to Dean, these broad processes of governing that can be considered as government in a governmentality analysis, can be categorised into three types: the governing of others (the traditional understanding of government); the governing of abstract entities such as particular population groups (the unemployed, single mothers and the ill for example); and the governance of ourselves (our bodies, our decisions and our actions for example) (1999: 12). The significance of this division, or more precisely, this expansion of government, lies in the broadened scope of analysis that it provides. The individual in particular, emerges in this image more as a construction of government than a free and separate individual as imagined in liberal democratic discourse.²⁷ Government then must be analysed not only as a mechanism for the assurance of the individual's rights, but as an agent that constructs the individual itself (and hence, his or her rights).²⁸

These processes of governing and constructing the individual are based on two distinct activities that will be of particular importance in this thesis- the acts of inclusion and exclusion (Rose, 1999: 240). Named by Rose, as "control strategies" (1999: 240) these two acts manage populations through the process of allocating individuals into various governmental discourses and apparatus. As terms, inclusion and exclusion appear to be opposites of each other. However, within governmentality, the division is not so clear cut. Within the idea of exclusion, Rose incorporates a further division to clarify its purpose:

(o)n the one hand there are strategies that seek to incorporate the excluded, through a principle of activity, and to re-attach them to the circuits of civility. On the other, there are strategies which accept the inexorability of exclusion for certain individuals and sectors, and seek to manage this population of anti-citizens through measures which seek to neutralize the danger they pose (1999: 240)

²⁷ This is not to say that the notion of freedom and the individual is obsolete in Foucault's work. See my discussion of the margin of liberty below.

²⁸ There is a wide literature available on the notion of bio-power and bio-politics, which Foucault developed at a later stage of theorising related to morality and ethics. Bio-power begins as a way of describing the particular governance of the self required in governmentality. Throughout this thesis, I will refer to Foucault's earlier ideas relating to this topic, namely, his notion of docile bodies. For literature discussing bio-power and bio-politics however, see: Osborne, 1996; Dean, 1999; Rose, 1999 and Lemke, 2001.

Exclusion and inclusion then, are elements of the same project to manage: to manage with the impulse to include individuals within governmental apparatuses or, to manage those who are not able to be incorporated so that they do not threaten, or as I will later term it, destabilise these apparatus and the norms that govern them.²⁹ Throughout this thesis I will argue that one of the key contradictions of the PRA stems from the blurring of the division between inclusion and exclusion of lesbians and gay men. As the example of Jill and Beth in the previous section indicates, the PRA includes people in same sex relationships in certain aspects of the law, but simultaneously excludes them from others. All of which is facilitated through the construction of sexuality as a process of governmentality, the focus of this thesis.

Governmentality then, is a social process of ordering, in the traditional way that we understand the term government. Governmentality is also however, a way of thinking about power and power relationships (Dean, 1999: 19; Lemke, 2001: 191). Governmentality in this sense, moves away from a sole concern with the physical characteristics of government itself- the people, organisations and material outcomes- and incorporates also more discursive questions relating to how and why power relationships come to exist (Dean, 1999: 16-19). Rose adds a further element of consideration to this definition by arguing that governmentality is also an "ethos" (1999: 5). This is to say that governmentality establishes a fundamental characteristic of enquiry into processes of governing that can be applied in a myriad of situations.³⁰ In this case, Foucault is the starting point for the development of enquiry and theorising rather than formulated tools and concepts. Rose's interpretation is both valid and useful- certainly, Foucault's work encourages the use of governmentality in this way. However, for the purposes of analysing the PRA it is necessary to develop concrete terms and

²⁹ Governmentality then, is intrinsically linked to the construction of both individuals (explored in this section) and truth (explored in much greater detail throughout this thesis, particularly in Chapter Three). Rose argues that governmentality is in part a mechanism to account for the production of truth: "It is thus a matter of analysing what counts as truth, who has the power to define truth, the role of different authorities of truth, and the epistemological, institutional and technical conditions for the production and circulation of truths" (1999: 39). For further elaboration, see Chapter Three.

³⁰ Dean makes a similar observation by suggesting that Foucault's notion of governmentality guides an "analytics of government" (1999: 27) where the focus is on questioning government and practices of power in a particular critical manner: "The enhanced capacity for reflecting on how we govern others and ourselves makes it possible to adopt an experimental attitude where we can test the limits of our governmental rationalities, the forms of power and domination they involve, and thus investigate *how we might think in different ways* about the action and the actions of self and others" (1999: 37 *emphasis added*).

tools of analysis. This thesis then, will follow a close reading of Foucault in the two ways described by Dean (although the works of Rose will be reconsidered in Chapter Four). Both draw directly and deliberately on liberal democratic theory and develop the necessary tools that form the base of governmentality. In particular, this will involve an understanding of some key Foucaultian terms- namely the conduct of conduct and the margin of liberty- that are explored below.

The Conduct of Conduct

Foucault's process of governmentality has been described as the "conduct of conduct" (Hindess, 1996a: 97; Dean and Hindess, 1998: 2; Dean, 1999: 10; Rose, 1999: 3)- that is, a form of power which is designed to regulate the actions of individuals which differs from more traditional, liberal democratic notions of power and the State, where power rests in a single loci (Dean and Hindess, 1998: 2). Governmentality, rather than directing individuals and exerting power over citizens as is found in liberal democratic notions of the State, acts to guide and formulate the actions, or the 'conduct' of individuals and groups (Dean and Hindess, 1998: 11). Dean (1999: 10) argues that this description of governmentality plays on a number of inferences and meanings belonging to the word conduct- to conduct, as in to lead (to conduct an investigation); to conduct as in to make ethical decisions for oneself (she conducted herself with dignity), conduct as in the name of an action ("professional conduct") and conduct as in a general regulatory measure ("codes of conduct"). What links these various meanings, he argues is the sense of regulation and more importantly, the sense of guiding norms that govern each type of conduct. This, he argues, is the basis of governmentality and the reason the conduct of conduct is such an apt phrase for its description (1999: 10-11). What comes into focus through this understanding are the key features of regulation (previously discussed as the management of the population) and norm and deviant categories that facilitate the regulation process.

According to Foucault, governmentality is a productive form of power aimed at regulating, not simply through punitive engagement, but through self-regulation in these localities (2000: 300). He argues that the production of norm and deviant binary categories, through governing discourses of which legislation is an example, formulate exclusionary practices upon which self-management is based (Dean, 1999: 102). The

production of deviant categories in particular against which norms are measured influence the choices of action that individuals make (Hindess, 1996a: 100). Although admitting a “margin of liberty” (Foucault, 1988: 12; Hindess, 1996a: 102) where resistance can occur (discussed in the following section), Foucault argues that these binary creations function in the main to govern and regulate society.

Key to his work on governmentality is an examination of laws and legislative systems and with this central argument of regulation that Foucault’s notion of governmentality becomes a critique of liberal democracy, which emphasises the enabling aspects of laws. Dean argues that law is one of four key features of liberalism,³¹ which in itself, he classifies as a rationality of governmentality (1999: 118). He argues that contrary to traditional liberal propositions of law described above, the key concern in an analysis of society is actually the normalising effects that laws produce. He states:

The key questions about law for an analytics of government do not concern its general meaning, function or role in liberal-democratic societies. The concern, rather, its operation within any given regime of practices, the role it is assigned within specific programmes of government, the technology it is part of, and the forms of subject it produces to work through and upon (1999: 118).

This critical contradiction of purpose will become the focus in this section.

Contrary to traditional liberal democratic approaches, Foucault’s work conceptualises laws and legal systems as having a primary management role. This argument does not nullify the liberal democratic basis of law as an enabling force. However, Foucault’s work on governmentality theory provides an extra level of interpretation to legislative systems and that these can be considered as dual purposes of law as opposed to an either/ or situation. For example, my overall thesis is that the PRA enabled lesbians and gay men in the same moment that it acted to manage them by reinforcing their position as deviant. What I mean by this is that the legislation produced two simultaneous effects with its passage. It gave legal rights, protection and obligations to lesbians and gay men in a manner which had never before been seen in New South Wales (or indeed, any Australian) legislation. However, these rights, protection and obligations set up a legal hierarchy of relationship types in terms of legal coverage. Marriage between a man and a woman is covered by over one hundred Acts under NSW and federal laws,

³¹ The other three are: economy, security and society (Dean, 1999: 111- 130).

heterosexual de facto relationships are covered by more than fifty Acts of NSW parliament, and the de facto relationships of lesbians and gay men, through the PRA, were covered by just over twenty Acts of NSW parliament (Millbank and Sant, 2000). This establishes a numerical hierarchy in terms of legal coverage which systematically renders same sex relationships deviant to legally more privileged and protected heterosexual relationships.³²

Foucault's exploration of norm/ deviant binaries as management projects encourages the interrogation of systems which codify social acts in such a way. Homosexuality, as Foucault examines, is one example of this codification. Systematically throughout history, systems such as legislation have codified homosexuality as deviant to a heterosexual norm- sodomy and buggery laws, discriminatory ages of consent, laws preventing same sex couples from adoption, etc. I contend throughout the thesis, that the legal codification of homosexuality in the PRA is part of this project and is therefore, more than a typical rendering of licit and illicit categories, which legal systems are understood to create. This assertion is based on the conflict of understandings and explanations of the two key approaches to legislative systems, which frame the thesis: liberal democracy and governmentality.

If we imagine the legislative system in liberal democratic terms, then the law is, essentially, a means to end oppressive forces. Legislative systems are charged with the duty of enabling freedoms and liberty. Absolute terms such as equality and rights are tangible in such a reading, as are repression and oppression. If we imagine the legislative system as a project of governmentality however, these understandings are brought into question. Law, in a governmentality reading, is one discourse within this management project, but not the only one. Rose describes this as a 'technology of government' (1999: 52)- that is, one of "an assembly of forms of knowledge with a variety of mechanical devices and an assortment of little techniques oriented to produce certain practical outcomes [within the project of governmentality]" (1999: 52). The primary role of legislation in this case, is to manage populations, rather than to create the conditions of liberty. Dean describes this situation of management: "To govern...is

³² For greater clarity on this topic, and how homosexuality becomes a site of governmentality, see Chapter Four. See in particular, my discussion of Rose's (1999) notion of governable spaces which accounts for how such things as sexuality can be rendered governable.

to structure the field of possible action, to act on our own and others' capacities for action" (1999: 14).³³ Primarily this is achieved through the production of norm and deviant categories, or more precisely, through the production of deviance, against which norms can be measured. In a relative sense, these two projects describe the same situation. Whether we describe the situation as licit and illicit or norm and deviance, we are containing the law, and our analysis of it, within a positive/ negative binary. I do not think this simultaneous act is a peculiar situation. Legislative systems codify licit and illicit behaviours and in doing so, both enable and manage, and create deviant beings.³⁴ Driving on the left hand side of the road, fishing licences, off leash dog walking zones, all enable certain things to be done, and set up the dichotomy of illicit actions at the same time. The effect is a management process- people, in general, drive where they should, fish appropriate loads and keep their dogs on leashes unless specifically walking in off leash designated areas. Similarly, the effect is to create a deviant, illicit figure usually related to punitive engagement. The deviant figure produced in such cases is the criminal. What I think is curious about the PRA however, is that it does not set up an illicit character, and yet, a deviant being is still tangible. Specifically, a deviant homosexual being is tangible. The process of management in this case is in the production of a licit being who is less endowed, less recognised and less enabled than another. An example will illustrate this point. Age of consent legislation in NSW sets the minimum age of consent at 16.³⁵ This legally enables people over the age of 16 to give their consent to sex. It also manages the population when it renders sex with a person under this age illegal. Any person who partakes in sexual activity with a person who is under the age of consent is acting in an illicit, illegal manner. The deviant person in this situation is the one who breaks the law, the illicit person the legislation implies. The PRA also legally enables people as well as managing them. Converse to the above however, the deviant person created by the PRA is not an illegal person, nor an implied person, rather a legal, enabled person- the person in a same sex de facto relationship. The PRA then, is bound to deviance in a manner which other legislation is not. What is particular to the PRA is that it actively creates a legal subject who is deviant rather than

³³ This stands in contrast to the more liberal democratic notion of laws that are designed to ensure pre-existing liberties through minimal encroachment on the actions of citizens (see earlier description).

³⁴ Dean argues, in a similar manner, that laws such as traffic regulations formulate the norms of society. He argues that they work by producing a set of constraints on society and a set of norms to guide the conduct of individuals (Dean, 1999: 120).

³⁵ See: *Crimes Act 1900 (NSW)*.

an illegal subject. This is the specific bind of the PRA and the point at which liberal democratic reasoning is found wanting in its understanding and analysis of this specific and general type of legislation.

The key to this contradiction as well as the key to understanding the apparent insufficiencies of liberal democracy in articulating the PRA lies in the notions of freedom and the individual which each discourse employs. The comparison will be articulated in the following section discussing the margin of liberty. What is important to understand here however, is that although the language of governmentality-regulation and management for example- implies an absence of freedom, this is not actually the case. Barry, Osborne and Rose argue that Foucault did not usurp the idea of freedom, rather, he altered the focus of its understanding in a governmentality analysis: "The task, according to Foucault, was not to denounce the idea of liberty as a fiction, but to analyse the conditions within which the practice of freedom has been possible" (1996: 8). In other words, to understand freedom and liberty is key, but not as objects, rather, as technologies which makes governing possible. In their discussion of advanced liberal democracies (a form of twentieth century Western government), Rose and Miller argue that in fact freedom is constitutive of the governmentality process.³⁶

Political power is exercised today through a profusion of shifting alliances between diverse authorities in projects to govern a multitude of facets of economic activity, social life and individual conduct. Power is not so much a matter of imposing constraints upon citizens as of 'making up' citizens capable of bearing a kind of regulated freedom (1992: 174).

Simply put, freedom is the major component in the construction of citizens, but since the construction of citizens is a process that aims to manage the population, that freedom is necessarily contradictory (Bell, 1996: 83). This is, I believe, key to understanding the deviant (but not illegal) being through the PRA. The enabling and managing dualism found in this figure corresponds to the regulatory freedom found in governmentality. Having said this however, there is a second notion of freedom that is apparent in governmentality- the margin of liberty. Although, as the discussion below indicates, this freedom is constantly obscured in governmental processes, it is a notion which represents a more common understanding of the term freedom.

³⁶ As do a number of other works. See for example: Rose, 1999: 65-69 and Dean, 1999: 15.

The Margin of Liberty

I have described liberal democracy previously as a process of assuring a series of pre-existing freedoms (liberty, equality etc.) through a process of limited governance for the prevention of harm (Locke, 1690; Mill, 1859). This assumes that freedoms are pre-existing and universal and that laws and legal systems act to enable these freedoms in the primary function (the secondary function being to prevent harm). On the other hand, in Foucault's description of governmentality laws and legal systems take on a more regulatory effect. In his description, laws and legal systems (as well as other discourses- families, schools, medical systems etc.) act to manage the population (Foucault, 1991b: 87). Such discourses construct 'normal' and 'deviant' behaviour and encourage actions towards the norm by penalising 'other' acts through processes of exclusion and penalty (Foucault, 1977: 199). These acts are not based on harm as in liberal democracy, but rather, are constructed as the binary opposite of the norm, which will ensure population management. For example, in his discussion of the Panopticon (an architectural ideal to enable surveillance- a key to constructing and policing norms), Foucault suggests that actions of "a madman, a patient, a condemned man, a worker or a schoolboy" (1977: 200) can all be regulated to ensure certain managed actions- collective planning, contamination, noise, time wasting, coalition and distraction, for example (1977: 200-201). Freedom in this sense is not pre-existing and universal but expressed more accurately with the notion of resistance- the potential to say no to regulating norms (Foucault, 1988: 12). In liberal democracy, the space of freedom is an ideal and universal state protected by laws and legal systems. In governmentality, the space of freedom is the margin of liberty, and although it always exists (there is always the potential to resist) laws and legal systems act to obscure or to mask it (Hindess, 1996a: 97).

Foucault's work on governmentality critiques liberal democratic visions of law as truth and objectivity (McNay, 1994: 117-18) as well as law as an assurance of pre-existing freedoms (Bell, 1996: 82). There are two aspects of Michel Foucault's work on governmentality that are particularly insightful in the quest to take contradiction seriously within legislative systems. As mentioned above Foucault articulates a conflict in purpose for such systems, arguing that legal systems, as part of legislative discourse, act to enable and manage populations simultaneously. This contradiction of purpose

appears to account for a substantial amount of the symbolic contradiction established by the *PRA*. Governmentality is also useful in explaining contradiction in legislative systems through a discussion of the margin of liberty. This section will explore the margin of liberty, envisaged as the potential to resist, as a multi-discursive space that marks the boundaries of legislative effect. In Foucaultian theory discourse is not wholly consumed by legislative symbolism. Acts or theory when described using governmentality, there are other-to-law discourses that interact with legislative systems, articulating other rationalities, imaginings and truths (McNay, 1994: 115-16). The interaction between rationalities and imaginings and conflicts of truth cause contradiction as laws are debated and experienced. In a liberal democratic framework, legislative systems have primacy in articulating truth and potential. Using governmentality, this primacy can be called into question and the quest of liberal democracy to maintain it can be understood as one further way in which contradiction is silenced.

The deviant figure of a governmentality analysis is necessarily more complicated than the illicit figure of liberal democratic discourse. Contrary to the intent of liberal democracy, Foucault says that the project of governmentality is never absolute- there is always a margin of liberty. There is always the potential to resist and this means that the deviant is never static. He argues that managing systems such as law attempt to minimise and mask this margin, but since power is a productive and reciprocal force, resistance is always possible (Hindess, 1996a: 102). In Foucault's analysis, governmentality is (crudely) the project of management and law is one central element within this. As Rose and Miller argue:

The enactment of legislation is a powerful resource in the creation of centres, to the extent that law translates aspects of a governmental programme into mechanisms that establish, constrain, or empower certain agents or entities and set some key terms of their deliberations (1992: 189-90).

What marks a governmentality analysis compared to a more liberal democratic approach to law reform however, is the possibility of resistance, without repression. In a traditional approach to law, resistance is possible only in terms of punitive engagement. Law is a pervasive truth, which categorises all action into binary understandings of licit or illicit. In a governmentality analysis however, law is conceptualised as less pervasive, one discourse of management amongst many which compete, support and

overlap. The multiplicity of discourse, and the reciprocal notion of power mean the project of governmentality can never be complete or absolute. There is always a margin of liberty where resistance can be acted out and alternative truths can be formulated. Foucault's thesis is that law seeks to minimise and obscure this margin of liberty in order to maintain its image of authority, but that this project is never absolute (Hindess, 1996a: 102).

In Australia, the line in the sand marking the margin of liberty has been creeping forward throughout history: from repeal of sodomy and buggery laws through to the removal of prohibition legislation and the introduction of limited protective measures with the introduction of anti-discrimination laws. However, the non-recognition of homosexuality through relationship laws had, to this time, been protected by NSW parliament and this maintained homosexuality as a deviant category. The passage of the PRA however, changed this situation dramatically, writing into legislation a newly recognised and enabled homosexual being. The margin of liberty is like a line in the sand, which can be redrawn through negotiation in order to co-opt parts of deviance into the norm, and remedy a legally measured oppression. I think there is a case however, for identifying the margin of liberty as a more productive and complicated space, and for measuring the role of legislation from this perspective.

There are a number of reasons why this distinction is important to this analysis. This notion of the margin of liberty situates resistance, power, agency and liberty outside of legislative boundaries, seemingly in contradiction to liberal democratic intent. This contradiction is not absolute, however it is informative. Most important in this approach to legal systems is that it takes the conditions which liberal democracy renders repression, and grants them a level of agency and choice. I stress again that the exclusions of lesbians and gay men from legal codes, which the PRA sought to rectify, is in any way acceptable or desirable. Similarly, I do not deny that the effects of this exclusion were discriminatory and, in many instances, repressive in their effect. What I do take exception to, however, is a liberal democratic reading that stops at this point. To understand legal exclusion simply in terms of repression, or inequality, is to grant no legitimacy and no agency to other discursive imaginings. What I will contend throughout the thesis, is that legal systems are only one avenue for relationship recognition, for the redress of troubled situations and for the accessing of notions such

as justice and liberty. I will contend that the margin of liberty, as Foucault describes it, abounds with discourse, not separate from law but other-to-law: connected to law in so far as all discourse within a given democracy must be, but other in emphasis, in primary imaginings and in terrains of effect. Acknowledging this abundance of discourse expands the basis of legal inquiry and understanding by breaking with binary understandings and opening the analysis to more pluralistic notions capable of admitting and articulating contradiction more readily.

It seems to me, given Foucault's later musings on the distinction between acts of liberation and practices of freedom, that the law is only ever capable of ensuring the first. Law can establish rules that enable certain acts of freedom, but does not "establish the practices of liberty" (Foucault, 1991a: 3) since these elements are contained within a project of management. Foucault argues that whilst acts of liberation can occur, they do not necessarily set up the conditions that decide or allow self-determined practices, self-determined freedoms. This is because law is an agent of governmentality. Dean argues that "(t)o govern...is to structure the field of possible action, to act on our own or others' capacities for action" (1999: 14). This suggests the limiting nature of law within governmentality as I have described it. Laws establish freedoms, but they are freedoms that are contained within set fields of possibility. This is a common point of concern raised throughout the governmentality literature, particularly those that consider liberalism to be a particular mode of governmentality (Barry, Osborne and Rose, 1996: 8; Burchell, 1996: Rose, 1996: 21; Dean, 1999: 113). Such literature argues that governmentality must have at the centre, an assumption that the citizen is active and in some form therefore, free (hence, the margin of liberty where resistance can occur) however, there is always too, a limiting impetus in governmentality, to act on and to contain this freedom (Bell, 1996: 83).

The introduction of the PRA poses an interesting illustration of this distinction between acts of liberation and practices of freedom. The Act itself may be thought of as liberating. I assert this for a number of reasons. Law reform for lesbians and gay men emerges as one of the long held political demands of the lesbian and gay liberation movement. Accordingly the PRA as a piece of legislation acts to counter legal invisibility and remedy oppressive practices many lesbians and gay men experienced as a result of it. For example, lesbians and gay men are granted the legal freedom of

hospital visitation rights and a space on the intestacy ladder. I say legal freedom here instead of actual freedom, since the PRA only provides the legal *conditions* that allow things such as visitation and inheritance rights. The actual freedom for these things to occur is reliant on the applications of this legal freedom by non-legal practitioners—doctors, nurses, families etc. This in turn relies on knowledge and education regarding the PRA and on willingness for this knowledge to be applied. When it comes to the relationships and the sex of lesbians and gay men, this failure is highlighted because the law simply extends pre-existing heterosexual definitions that do not necessarily (and are not necessarily intended to) fit (see Chapters Seven and Eight). This act of legal liberation does not establish *practices* of freedom. The liberatory act of the PRA does not establish a pattern of practices that allow sexuality to be free in any practical sense. Indeed, as governmentality suggests, it may well establish a situation, which runs contrary to freedom, that is, to contain and regulate it.

This is where the margin of liberty, as resistant discourse, is of use to an analysis of the PRA and in turn, to the development of liberal democratic notions such as justice, freedom and liberty. In Foucault's summation, practices of freedom are necessarily located outside or other-to law and legislative systems. If we are to conceptualise the margin of liberty as discourse other-to-law then we are to locate the arena for the potential articulation and realisation of these notions. Certainly this is problematic as well as useful— in a post-modern world, discourse is multiplicitous and can be seen to be so to the point of being irreconcilable, and the potential for agreement within this plurality on what the practices of freedom may be is questionable. However, liberal democracy encounters the same problems of definition. The legislative system silences contradiction caused by the multiplicitous nature of discourse, in order to maintain its position as a privileged truth teller. Primarily, it does this through encompassing liberal democratic rationalities and through governmentality projects such as the creation of binaries. By taking into consideration the margin of liberty, the realm of inquiry and the potential for the realisation of liberties and freedoms are taken from the silent contradiction of a management project. The scope of inquiry is broadened and plurality replaces a more restrictive notion of contradiction. This inquisition into the potential of the margin of liberty to instruct practices of freedom will form a central quest in the thesis.

1.6 The complications of sex

The management element of the PRA is one consideration to be made in the challenging of a liberal democratic reading of the legislation. The PRA is a piece of legislation ostensibly about relationships, but fundamentally about sexuality. More specifically, the PRA is a piece of legislation about sex and the types of bodies involved in that sex. The specific of sex then- sexuality and bodies- is pivotal also to any analysis of the PRA since it marks the Act as significantly different from the majority of legislation types in liberal democracies. The issue of sexuality, sex and bodies is pivotal, rather than incidental, to the manner with which the PRA was negotiated into being. This summation can be supported at a number of levels- two directly and two less direct historical trends. Primarily, the PRA sets its own parameters of sexuality when it discriminates between exclusively heterosexual and gender-neutral relationship definitions. The legislation determines the scope of its application through a typification of bodies involved in the relationship: if they are male and female they will be treated preferentially to those that are relationships between two female or two male bodies. The indicators as to the existence of a relationship the PRA provides for a court's application also rely heavily on notions of sex, for example, shared bedrooms during co-habitation. This is done through an indicative list provided at s.15 of the PRA (see Chapters Seven and Eight). Homosexuality also has a pervasive history of being read as 'sex' in courts and parliaments throughout Australia. This historical trend then, provides a backdrop of support for this notion as well. Custody cases featuring issues of parental homosexuality for example, are well documented as having a focus on sexual practice and indications of homosexual activity disproportionate to those involving heterosexual parents (Bateman, 1992). Parliamentary debate surrounding issues such as the Sydney Gay and Lesbian Mardi Gras, AIDS and the outing of high profile Australians frequently make reference to notions of promiscuity and sexual perversity, and similarly, debates surrounding paedophilia and child abuse almost invariably contain reference to homosexuality as if the two were causally linked (Willett, 2000: 242). Such references build a strong case for the pervasive reading of homosexuality as 'sex' between bodies, which are somehow 'deviant' and hence, support the notion that the PRA has a specific of sex, which is in need of analysis.

There are two distinct ways in which this specific of sex can be analysed to further an understanding of the contradictions involved in the PRA. An understanding of Foucault's notion of sexuality and its historic usage as a marker of deviance, furthers and supports the argument that the PRA plays a double and contradictory role in legislation- enabling and containing simultaneously. Foucault's notion of speaking sex (1980b: 95) provides a further level of analysis in this exploration of contradiction, articulating the tensions between a society that purports a Victorian prudishness and repression of sex and sexuality, and actualises a proliferation of sex chatter. An understanding of recent literature discussing the tensions between bodies and law, particularly involving the critique of the mind/ body dualism such as is found in many second wave feminist analyses of the law (for example, Pateman, 1988), provides a backdrop of friction and corresponding contradiction within this analysis. This argument is further supported by Foucault's argument that bodies are a privileged site of analysis and management (1980a: 140).³⁷

Foucault's work on sexuality argues against the popularly held belief that sexuality is repressed (Foucault, 1980a: 11). He terms this the "repressive hypothesis" (1980a: 11). He argues instead, that there has been, since the seventeenth century onwards, a proliferation of matters relating to sex (1980a: 95). Foucault's notion of "speaking sex" is discursive, and centres on an historical analysis of sex and sexuality as presented during this time of proliferation. He argues that institutions and their governing discourses, speak sex in order to create and regulate specific understandings of sexuality, particularly within a norm/ deviant binary. For Foucault then, sexuality is not an innate phenomenon but a social construct, the "deployment" of which, must be unravelled (1980a: 75). This is not a claim that there is not sex, but rather an assertion that sexuality as we are enmeshed in it, is so invested in and by power relations that it cannot be reified as simply a biological given.

Such an understanding has numerous and significant ramifications for an analysis which engages with liberal democracy and its interactions with sexuality. The enabling role of legislation supposed by liberal democracy is again brought into question, with specific

³⁷ Foucault's work in this area will be briefly surveyed here, and taken up in greater detail throughout further chapters.

reference to the PRA. This occurs at two levels- through the debunking of the "repressive hypothesis" and through an analysis of the role of legislation in regulating sexuality. Foucault argues that liberal democratic ideals such as liberation and freedom, which underlie an understanding of sexuality (in this particular instance, homosexuality) as repressed, turn attention away from how sexuality is produced in society and what processes legitimate and regulate certain understandings of sexualities. Understanding legislation that deals with sexuality and sex then, can only ever be partially understood through notions of liberation- this may be an effect of legislation however, not the sole effect. Sex chatter, produced through legislation as a process of speaking sex, also has an historical effect of formulating understandings of sexuality- primarily the norm/ deviant, heterosexual/ homosexual binaries discussed previously.

The contradictions that are highlighted through Foucault's understanding of sexuality however, are not simply a reinforcement of the clash between enabling and managing purposes. There is also a finer point to be made about the intent of liberal democracy to enable freedoms for that which is pre-existing (for example race, gender and sexuality given freedoms through anti-discrimination laws), and the Foucaultian notion that power is a creative force and that sexuality is socially and discursively created rather than always and already existing. What this means is that a Foucaultian understanding of legislation, allows for a conceptualisation of power which does not simply enable, but also creates certain types of sexuality- in particular a deviant (homo)sexuality against which a norm (such as marriage or heterosexual de facto relationships) can be measured. The contradictions between law as expressed in legislative Acts, and as experienced in the real world find articulation in this type of understanding when deviant and legitimate homosexual relationships attempt to reconcile through the PRA. Certainly, this is not to say that law in liberal democratic theory is solely uncomplicated and raised to a pedestal as the perfect mirror image of all people everywhere- there is an assumed symbolism in the type of person the law reflects. However, this understanding explains contradiction and assumes it as a necessary, albeit unfortunate, by product of legislation.

Foucault's work differs in its emphasis on the creation of types of sexuality within a project of management. The contradictions between the Act and the lived experience in this instance, comes from the desire to manage. If the aim of management is to get

individuals to monitor and alter their conduct as was previously explored, then as an agent of that management project, legislation is necessarily required to create norm/deviant categories in friction with reality. This implies a deliberate and purposeful intent. Foucault's work then, allows this process to be explored rather than offering simply an explanation for the contradictions posed by the PRA. Foucault's work also destabilises the sovereign type understanding of power (1980b: 136) which liberal democracy presupposes in its reliance on laws to enable freedoms and liberty. In doing so, it allows a more plural perspective of law as one of many discourses aimed at regulating and managing sexuality. In understanding plurality and friction, the corresponding contradictions can be more freely conceptualised and understood.

The specific of sex that the PRA possesses further enhances an understanding of contradiction when literature regarding the conflicts between bodies and law are considered. Naffine and Owens argue that "[p]erhaps more than any other discipline law has neglected the physical person" (1997: 12). This is not to assert that law does not deal with bodies, nor to assume that it does not construct bodies in a Foucaultian sense. It does suggest however, a theoretic tradition and practice, as Naffine argues, which is preoccupied with minds, rendering bodily considerations secondary (Naffine, 1997: 82). Naffine argues that the "abstract individual" (1997: 79) at the centre of law, focuses legal attention towards minds and the ability to reason. This is despite the fact that law creates, in Naffine's thesis, specifically sexed and gendered bodies through legislative assumptions and practices (1997: 93). This type of understanding contradicts a more traditional liberal democratic perspective emphasising the division between public and private spheres, where the private sphere is "not the concern of law" (Naffine and Owens, 1997: 4). The body however, has long been subject to the rule of law. Feminist works on bodies and sexuality, particularly work on alternative fertility treatments (Stuhmcke, 1997), the pregnant body (Colker, 1994) and abortion debates (Petchesky, 1990), have highlighted the contradictions inherent in this liberal democratic public/private divide. Neal Curtis argues that legislative systems act to contain bodies as a matter of necessity since primordial connotations are such that a body is perceived as having a freedom "in excess to the realm of law" (1999: 255). The production of binary categories such as heterosexual/ homosexual, normal bodies/ deviant bodies, which the PRA illustrates, is, in a Foucaultian sense, a prime example of this type of attempted containment. Bodies however, are far from docile or containable (Foucault, 1977: 136).

The corporeality of bodies equates with an agency that legislative systems attempt to negate or minimise. Acknowledging this agency, and the struggle of liberal democratic systems and theories to minimise or mask the conflicts between bodies and laws, further articulates an understanding of contradiction within the PRA and highlights the limitations of liberal democracy in exploring them.

Of course, the task of addressing the contradictions of liberal democracy, particularly as they relate to issues of gender³⁸ and sexuality,³⁹ has been taken up by scholars of feminist jurisprudence before me and it would be naïve not to acknowledge this lineage of thought. As a generalised theoretical trend, feminist jurisprudence itself is focussed on exploring the tensions associated with the contradictions of women within liberal democracy, and more specifically, under its rule of law (Barnett, 1997; 1998; Naffine, 2000). The essential contradiction between the experience of women and their representation in law and legislative systems has been examined at length through feminist jurisprudence (Pruitt, 1994; Barnett, 1997).⁴⁰ What feminist jurisprudence uncovers is a foundational contradiction between the theory and practice of law, and women's experience of the same. It has further asserted an inherent contradiction between women as they are constructed in legal systems, which are patriarchal, and women as they experience themselves in the social realm (MacKinnon, 1983: 636).

The tradition of feminist jurisprudence challenges the core of liberal democratic visions of the law as neutral and objective. Frances Olsen for example, argues that what is presented in law as neutral and objective is in fact representational of masculine traits. Olsen's debate is premised with a discussion of "liberal dualisms" which structure thought into dualistic "contrasting spheres or polar opposites" (1990: 199). Olsen suggests that these dualisms: "rational/ irrational; active/ passive; thought/ feeling;

³⁸ See my discussion at n8-10.

³⁹ This area includes two distinct and separate trends of inquiry: sexuality as it relates to lesbianism (Eaton, 1994; Herman, 1995) and sexuality as it relates to sexual violence such as rape and assault (Naffine, 1994; Gardam, 1997).

⁴⁰ Hilaire Barnett argues feminist jurisprudence uncovers what is presented as neutral and objective in the law, to in fact be patriarchal beliefs, norms and assumptions (1997: 51). What feminist jurisprudence scholars have argued, Barnett suggests, is that the link between legal theory and the social and the political realms, is tangible, and that these realms are dominated and perpetuated by patriarchal attitudes (1997: 50). Barnett further argues, that the common task of feminist jurisprudence, is to uncover this bias in the law and to address the ramifications of this bias, which overwhelmingly equates to women's oppression and rendering to the status of "second class citizens" (1997: 59).

reason/ emotion..." are crucially sexualised and hierarchised. The most privileged and dominant of each dualism (rational; active; thought; reason etc.) being associated with the masculine, or more particularly with men. In perceiving the law as rational and as objective then, it follows that the law should be identified as masculine, or male since these are the sexualised traits of men. Feminist jurisprudence also challenges the key ideological concepts of equality, justice, freedom, liberty and rights.¹ Catherine MacKinnon argues that this idea of neutrality and objectivity in law is a patriarchal construction. What appears in the law to be a universal standpoint, she argues, is in fact a male standpoint: "Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality" (1983: 639). Such a claim of universality, of objectivity and of neutrality, she argues, denies the material reality of women's inequality both in society in general and in or under law (1983: 636). The experience of patriarchy is the experience of women's subordination to and inequality with men. This experience, MacKinnon extrapolates, is also the experience of women in and under law. MacKinnon argues that the treatment of women by the law, stands as material evidence of the law as patriarchal:

I propose that the state that the state is male in the feminist sense. The law sees and treats women the way men see and treat women. The liberal state coercively constitutes the social order in the interest of men as a gender, through its legitimising norms, relation to society, and substantive policies (MacKinnon, 1983: 644).

The abstract citizen at the centre of liberal democratic discourse is necessarily universalised since it is intended to represent vastly disparate communities and individuals. What feminist jurisprudence and other similar theoretical engagements with law such as gay and lesbian rights theories have established however is that this universalising process is specifically sexed and gendered. Early examples of this critique such as the work of Catherine MacKinnon (1983; 1993; 1996) laid the foundation for understanding the insidious function of this process. She argued of male dominance "(i)ts point of view is the standard for point-of-viewlessness, its particularity the meaning of universality" (1983: 638-9). Following this notion, others, such as Gary Kinsman levelled similar complaints against this universalised citizen based on the "heterosexual hegemony" (1987: 17) at its base. This lineage of theory (as discussed in the previous chapter) brings into question the objectivity of liberal democracy and argues for an understanding of the liberal democratic citizen as based in both masculinity and heteronormativity. Amongst the many implications that arise from

these observations is a basic contradiction between law in theory and law in practice for women, in particular lesbians, and for gay men. This is because the universalised citizen at the centre of liberal democracy and hence at the foundation of law's production, is contrary to the logic and experience of many women, lesbians and gay men.

If we return to the scenario of Jill and Beth and consider the specific nature of contradiction of the PRA that I likened to walking through shadows, we can see this contrary logic in action. In the majority of cases this contradiction is one of recognition and scope- in legal terms Beth is Jill's partner under certain circumstances and not under others. Similarly, if we call on the other contradictions I outlined in the previous chapter, they fit into a similar category. The contradiction of recognition and scope stem from state by state comparisons of relationships laws, state and federal comparisons of the same and a comparison between heterosexual and same sex relationships under NSW law. People in same sex relationships walk in and out of legal recognition dependent on jurisdiction and circumstance and often times this stands in direct contrast to the experience of these relationships for those involved. For example, Jill and Beth were considered a couple by Jill's school community but were not considered a couple in legal terms when it came to employment legislation facilitated through the same school (in the instance of parental leave). The presumption of heterosexuality prevails in this liberal democratic equation defining the citizen who parents.

Of course, the universalised citizen does not comfortably match any individual (even the heterosexual man) entirely. Not only does the margin of liberty assure the potential to wilfully resist, but there is also a certain level of assumption that citizens will not always act in accordance to given laws through combinations of laziness, ignorance, lapses in concentration, etc. (littering, speeding, talking on mobile phones whilst driving, are all examples of common breaches of law made by law abiding citizens). However, there is a marked difference in nature between these two examples. Each transgression of law I just described is likely an occasional and voluntary act. Legislation such as the PRA alternatively, produces a systematic and deliberate exclusion of lesbians and gay men from certain acts of legislation. If, as in the classic liberal democratic equation, laws are read as mechanisms for enabling citizenship, then this difference reflects the extent to which homosexuality is excluded from liberal democratic notions of citizenship. It demonstrates too the extent to which contradiction

characterises the experience of lesbians and gay men in legislative systems that are underpinned by liberal democracy.

The more specific task of using Foucault and Foucaultian notions of reciprocal power relations to examine contradiction within liberal democracy has been taken up in particular, by post-structuralist theorists of feminist jurisprudence (Ashe, 1987; Eichner, 2001; Quinn, 2002). This theoretical inquiry takes as a base a similar criticism of binary dualisms within legal and feminist theories as I have made above. The use of Foucault's theories and the works of others, particularly French feminist discussions of the 'other', are integrated into legal frameworks. This introduces plurality of subject and meaning and aides in conceptualising agency of those traditionally represented as being 'under' the rule of law.⁴¹ In this way, the contradictions of liberal democracy are addressed through reconceptualising legal categories and definitions. Marie Ashe for example, argues:

Poststructuralism proposes inquiry into the alterability of the most fundamental structural components of legal theory. The implications of this kind of inquiry for women, and for other subordinated subjects, are enormous and profound. Law's recognition of its own limitation may open its ears to hearing the namings, the self-definitions, and the claims of oppressed persons, and more significantly, may permit Law's recognition that its customary namings and classifications have no greater claim to validity than do the self-narratives of those whom it has kept in silence (1987: 1172).

In a way, what I argue throughout the thesis is a similar proposition. Through taking contradiction seriously, I hope to fracture the apparent homogeneity of liberal democratic discourse and to open a space where diversity and plurality can be explored. I too, want to explore within my work the "self-narratives" that are discursively situated other to law (see Chapters Seven and Eight). What I propose throughout the thesis is likely a lineal extension of feminist jurisprudence in some way.⁴² Ultimately however, I am sceptical that this is an accurate depiction of what follows. The base of this claim

⁴¹ For example: women, gay men and lesbians, racial and ethnic groups etc.

⁴² I would argue that feminist jurisprudence is foundational to the lesbian outlaw as I develop it throughout the following chapters. It may appear contradictory in itself to lay claim to feminist jurisprudential roots whilst simultaneously questioning the utility of existing theoretical ideas. It is my firm contention however, that the lesbian outlaw standpoint, and the theorising I will propose that incorporates the same, is only possible to imagine because of this history of feminist legal theorising. There are two justifications for this claim. Such theorising has achieved essential groundwork for the lesbian outlaw. It has set the agenda of legal inquiries to feminist foci, has acknowledged and articulated contradictions within legal systems and between law and its lived experience, and has challenged the apparent neutrality of law posed by liberal democratic rationale. It has also set the parameters at which the lesbian outlaw appears by articulating debates amongst its own authors that appear irreconcilable. It is this challenge, I will argue, that brings the lesbian outlaw into being.

has to do with aligning myself with a theoretical tradition that is necessarily located within the very discourse that it critiques.⁴³ Regardless of the invocation of multi-discursive plurality, the ultimate goal of poststructuralist feminist jurisprudence is the same as all feminist jurisprudence- to activate within a given legal system that is likely based within liberal democratic tradition. As Ashe argues, the goal is to open law's ears and make law recognise things about itself and others. Whilst the practical ramifications of feminist jurisprudence are undeniably important, there is a theoretical location associated with it that I do not want to take as my basis in the thesis.

In the following two chapters I propose a framework for the exploration of the PRA by developing an understanding of the lesbian outlaw. The following two chapters will develop the lesbian outlaw as a symbolic citizen, as a politico-legal discourse and as a device for the critique of legislative systems, analogous to liberal democracy, but with lesbian sexuality at the fore. In one of the major inroads into understanding the lesbian outlaw (and before this, lesbian jurisprudence (Davies, 1994: 211; 2002: 245)), Ruthann Robson argues that the lesbian (in Western legislative systems) is both "outside of the law and within it" (1992: 11) simultaneously, and that this key contradiction characterises the lesbian outlaw (Davies, 1996: 144). Whereas liberal democracy appears to construct this contradiction under the guise of universality and objectivity, the lesbian outlaw as Robson poses it, founds itself on this basic contradiction. Throughout these chapters I will explore the potential for the lesbian outlaw to counter pose universalist notions belonging to liberal democracy that do not give adequate measure to the contradiction that they construct. My intention is to be less deterministic in this exploration than feminist jurisprudence, which as Ashe's words indicate, takes as its function the reformulation of legal discourse and the rule of law. 'Law' is less rigid a concept as functional theory such as feminist jurisprudence seems to envisage. Foucault's work not only leaves the legacy of imagining multiplicity as a characteristic of discourse (that is, that multiple discourses can be imagined), but also fluidity. The essential nature of Foucaultian power is that discourse interacts and I will characterise that interaction as fluidity. The fundamental alteration of perception enables the

⁴³ Audre Lorde's statement "the master's tools will never dismantle the master's house" (Lorde, 1996: 158) comes to mind here and serves as an apt reminder of the difficult task feminist theorising is set- not simply to improve the conditions for women but to conceptualise something other than established patriarchal conditions of being.

envisaging of multiple sites for law and legal discourse. Further, it is to envisage a more dynamic coalition of discourse- not admittance as Ashe advocates- but symbiosis and transmogrification.

1.7 Conclusion: Legislative Binds of the PRA

This chapter is premised on the assumption that the PRA established a series of contradictions in the legislative system within which it functions. This piece of legislation has been interpreted within a liberal democratic framework that emphasises its enabling characteristics and its role within a liberating social project. Whilst not seeking to undermine the significance of this piece of legislation, such an understanding is limited in its interpretative scope and does not adequately conceptualise the contradictions inherent in the PRA. Essentially this statement is a critique of liberal democracy, and its refusal to admit contradiction despite the obvious generation of such stemming from its theoretical makeup. Foucault's notion of governmentality encourages this type of critique of liberal democracy and explores the inherent contradictions of legislative systems. Foucault's work also discusses the margin of liberty within the project of governmentality and in doing so, provides a framework for the discursive consideration of legislative systems using other-to-law rationalities.

The refusal to admit contradiction is a more generalised problem of liberal democracy which, in different ways, feminist jurisprudence and Foucaultian theory have articulated. The role of liberal democratic interpretations and rationalities in creating these contradictions will be further explored in proceeding chapters. What follows immediately however, is the development of an alternative framework for interpreting and understanding such things as the PRA in a manner, which, as Curthoys has argued the need for, takes the challenges of contradiction seriously (1997: 8).

Chapter Two

Unravelling the Bind: Situating the Lesbian Outlaw

Advocating the mere tolerance of difference between women is the grossest reformism. It is a total denial of the creative function of difference in our lives. Difference must be not merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialect (Audre Lorde, 1996: 159)

2.1 Introduction

The following two chapters introduce and argue the basis of my analytical framework through the development of the lesbian outlaw. In the previous chapter I asserted a limited utility of liberal democratic theories in viewing the implications of the PRA. Through this claim I examined more generally the limits of liberal democratic citizenship as a theoretical concept and particularly iterated debates amongst feminist and lesbian theorists that critiqued this construct because of its essentialist base of masculinity and heteronormativity. I continue examining such lesbian and feminist claims by introducing the idea of the lesbian outlaw- a figurative subject position and a theoretical proposition that I propose as a counter position to liberal democracy in critiquing laws and legislative systems. The basics of the lesbian outlaw as I am proposing it will be formulated in this and the following chapter. However, the lesbian outlaw also becomes a tool for analysing the *Property (Relationships) Act 1984 (NSW)* throughout the thesis and as such, this theoretical concept is further developed in these chapters.

The lesbian outlaw is an idea that emerges in various theoretical and literary guises, particularly in feminist works on marginality and radical politics. Although there are a number of texts that utilise the idea of the outlaw, and even the lesbian outlaw as a specific case, there has been little concerted effort to collate these images/ usages to formulate a concrete understanding of the characteristics that mark the utility of the outlaw in academic theorising. This will be the key task of both this and the following chapter. This chapter addresses this deficiency by discussing various usages of the outlaw and examining the commonalities of such. The culmination of these theoretical

lineages is to establish four key characteristics of the lesbian outlaw. These are: the contradictory existence of the lesbian outlaw; an insistence on rupture and plurality; a preoccupation with notions of justice, and a lesbianism that informs discursive inquiry. This theoretical exploration of the outlaw will be continued throughout the remaining chapters of the thesis in an attempt to consolidate the theoretical rigour of the lesbian outlaw in legal inquiry. Each of these characteristics will be held against the criteria I have defined for taking contradiction seriously to assess the utility of the lesbian outlaw in legal theorising and specifically for an analysis of the PRA.

This chapter explores the common characteristics that mark the utility of the lesbian outlaw by exploring the usefulness of such a figure in addressing the critiques of liberal democracy outlined in the previous chapter. The limitations of the lesbian outlaw, particularly the lack of a discernable theoretical base, are also explored. Drawing on suggestions from the previous chapter Foucault's theoretical tools are foreshadowed as an ally to a lesbian outlaw and a combination of the two is proposed. This task is then taken up in the following chapter.

2.2 The Lesbian Outlaw

In popular mythology the outlaw permeates western culture as a roguish character-outcast by society and relishing in the outsider status. The outlaw is a loner with a quest, a notorious law-breaker and most often, the forbidden love interest. In academic theory, the outlaw emerges in a similar fashion, external to mainstream theoretical practice, concerned with issues often relegated to the periphery, and acting to fracture dominant discursive ideas. The outlaw appears in a variety of theories based on such notions as race (Lugones, 1992; hooks, 1994), sex and sexuality (Robson 1992; Jeffreys, 1993) and gender (Jaggar, 1989; Bornstein, 1994; Spelman and Minow, 1995) to articulate experiences, cultures, communities and practices that are rendered deviant or marginal through dominant discursive inquiry. Although the figure of the outlaw is tangible in a wide variety of feminist literature, there is no comprehensive description of who she is, nor is there concerted analysis of her theoretical potential. The following is a summary of literature that discusses and utilises the lesbian outlaw. It will be considered further in the next section where I will offer my own interpretation of the lesbian outlaw and outline the ways in which it will be used in my analysis of the PRA.

In the realm of popular and community culture, the lesbian outlaw has many incarnations, which mark the wild, rebellious and exciting notions of outlaw status.⁴⁴ She is found primarily at the periphery of 'acceptable' sexual society, making appearances in erotic stories (Roberta, 1999), pornography and S&M novels (Arobateau, various). In the on-line cartoon "Queer Nation", 'Outlaw-previously the last lesbian on earth' is a gun wielding, mid-riffed super hero out to save the world from the heterosexual menace and, as all good super heroes should, breaking a few hearts along the way (<<http://www.queernation.com>>). Interestingly, Sheila Jeffreys (1993) associates these kinds of outlaw incarnations as a direct threat or refusal of lesbian feminist politics. She argues that the lesbian outlaw has moved from a focus on political outlawry to one of sexual outlawry that often times contradicts the essence of these politics. Jeffreys's argument of how the lesbian outlaw *should* be characterised will be discussed later. What I am trying to do here is not to enter into the specific politics of the lesbian outlaw, but to ascertain the continuous and multiplicitous imagining of the lesbian outlaw within lesbian cultures and endeavours.

As Jeffreys's concern suggests, the lesbian outlaw does not simply emerge as a character of fiction.⁴⁵ More poignantly, she also emerges as a consciousness in lesbian thought. The lesbian outlaw is generated and perpetuated throughout lesbian communities as both a space to be and a self-titled mode of being. Community examples can be found in various places including publications such as Spoon Bennet's (2002) "Outlaw Mom"; and the Auckland Lesbian and Gay Lawyers Group (1995) *Outlaw: A legal guide for lesbian and gay men in New Zealand*, both of which self title the situations of their sexuality as outlaw. There are also a number of gay/ lesbian organisations that play on the word 'outlaw' as a self description- the LBGTI student support/ political organisations New England School of Law (Boston Massachusetts) and at Washington University entitled Outlaws and OULTAW respectively, are examples of this. Academic and political examples include Sheila Jeffreys's (1993) and Kathleen Kennedy's (2000) discussion of lesbian/ sexual outlaw as a term of self

⁴⁴ Of course this is not the only interpretation of the outlaw, which, as later discussion will indicate, is also considered to be a negative figure associated with notions of inequality and discrimination.

⁴⁵ Which Martha Smith (nd) suggests extends to explorative narrative pieces such as those by Djuna Barnes, Gertrude Stein and H.D. (Hilda Doolittle).

description coined by a variety of lesbian feminists from the late 1970s onwards. Examples of this are also found in Claudia Card's (1995) "Finding My Voice: Reminiscence of an outlaw."

The lesbian outlaw of theory draws on these popular qualities, and yet, as appealing as the lesbian butch version of John Wayne may be, she represents much more than the Wild West heart breaker. Notably, Elizabeth Spelman and Martha Minow argue that the traditionally "revered" figure of the outlaw is necessarily male. They suggest that: "(u)nlike their male counterparts, whose 'deviant' outlaw behaviour heightens their manhood, such women [who break the law] risk appearing not to be just deviant citizens but deviant women" (1995: 1281, note added). The image of the lesbian outlaw then, is a specific attempt to rupture this masculine gendering/ sexing of the outlaw and claim the radical nature of the outlaw for women. The lesbian outlaw draws attention to a point at which lesbian sexuality and theoretical characterisations of the outlaw come together. The symbiosis of this I have collected below in a thematic fashion in an attempt to overcome the disparate nature of the lesbian outlaw in various guises throughout theory.

1. Contradiction

As discussed earlier, Ruthann Robson argues that the lesbian (in Western legislative systems) is both "outside the law and within it" (1992: 11). Whilst there is no one set of characteristics that determine the outlaw, there is a unifying sense in the texts that explore this figure of this contradictory nature. Debra Burrington for example, poses the question "who is really the outlaw?" (1994: 267) when discussing the contradictory construction of (homosexual) outlaws through legal discourse. She argues similarly to Robson above, that defining the outlaw is not as simple as locating those who are out of law:

In the case of the homosexual and homophobic violence...construction of outlaw becomes unclear. For example, laws exist to protect all citizens from terroristic threats, intimidation, and assault, so one might theorise that the outlaw in the case of homophobic violence is the perpetrator of a violent act or the creator of an environment that terrorises or intimidates the homosexual citizen. Contrary to this logic, however, in American culture the homosexual is constructed as outlaw (Burrington, 1994: 256).

For Burrington, the specific example of sexual outlawry stands in contradiction to both common logic and legal scripting. A similar situation as she describes is repeated in

the Australian example. Here, outlaw status is rendered to lesbians through various exclusions. These exclusions are legal, for example marriage or superannuation rights which are confined to heterosexual couples. Some exclusions are social, for example homophobic graffiti or queer bashing. They are political when the Prime Minister can only offer "tolerance without endorsement"⁴⁶ to lesbians and gay men. They are emotional, they are financial, they are work related, and family related, perpetuated by popular culture and history texts and a plethora of other social discourses. For Burrington, these exclusions mark the outlaw and as such, she argues, the outlaw is a negative construction that "stigmatises, marginalises, and "deviantises" these persons, thus at least implicitly justifying many forms of oppression directed toward them" (1994: 265).

I do not contend that Burrington is wrong. The act of outlawing- for example outlawing gay marriage and outlawing gay adoption, which are key issues in current Australian politics- have *explicit* negative implications for lesbians and gay men. Foucaultian theory does not prohibit an understanding of the effect of negative sanctions or repressive acts (1980a: 12). However, along side this understanding, Foucaultian theory insists on a parallel, or symbiotic understanding of the situation as not entirely negative. The potential for resistance must be acknowledged. In some instances this resistance may mean direct action against the discursive power constructs that are having affect- as Chapters Seven and Eight will indicate, all of the lesbians I interviewed engaged in some kind of subversive/ resistant actions in reaction to the limitations of law that they live under.⁴⁷ Sometimes however, this resistance is less direct and relates more to discursive relations than to action. There is a certain element of excitement and creative freedom in being outside of dominant norms. There is a freedom in being an outlaw at the same moment that there is restriction and

⁴⁶ Australian Prime Minister John Howard has consistently offered an attitude of "tolerance without endorsement" ('David' quoted in Kingston, 2000), as one author described it, towards homosexuality during media interviews. This was highlighted in the 'debate' regarding the rights of lesbians and single women to access fertility services in Australia in 2000 and was raised again in his discussion of gay marriage throughout 2004.

⁴⁷ I am reminded here of cultural parallels with the lesbian outlaw, the investigation of which are beyond the scope of this thesis. Their recognition here is important however, in building a case that outlaw and lesbian are comfortable and indeed historical co-terms. In particular cultural events highlight the outlaw characteristics such as the development of lesbian communities and attempts at formulating lesbian specific (non-hierarchical) forms of regulation and conduct. See for an exploration Faderman, 1992.

affliction from being outlawed. This central friction is the focus of my examination of the lesbian outlaw.

The essential contradiction of the outlaw then, is outlawed status and acts of outlawry indicating both subjectivity and agency in the same moment. Shelia Jeffreys highlights the potential contained in this contradiction. She discusses the lesbian as a "heretic", an outlaw from what she perceives, as the oppressive binds of heterosexuality (1993: ix). Outlaw in this sense, indicates a rebellion, a refusal to abide by social proscription. Jeffreys' work discusses the theoretical potential of lesbian-as-outlaw to arrive at an alternative pattern of society. She delights in this potential but juxtaposes it against the lived reality of outlaw, or, outsider status: "Many of us enjoy being outlaws. If we were not rebels we might not have the courage and strength to continue being lesbians in a lesbianhating world" (Jeffreys, 1993: 114). For Jeffreys, the potential of lesbian-as-outlaw appears in this contradictory manner, as both a revolutionary and oppressive position in which to exist.

The lesbian outlaw in this sense is a symbolic figure. Sally O'Driscoll makes a similar point: "This notion of the lesbian as *outside*- paradoxically privileged by her invisibility and exclusion- focuses on a construction of the lesbian as metaphor rather than material body. It is what one might call, in the terminology I am suggesting, the outlaw definition of lesbianism" (1996: 42). Functioning within a democracy the lesbian outlaw is firmly situated as a citizen within a legal system, she is always 'in' law. In some instances (discussed later), lesbianism is distinctly over legalised, such as in the example of some IVF laws which expressly prohibit lesbian access. As a lesbian however, her sexuality is also excluded and omitted from legislation, and as such, she is outlawed (Robson, 1992: 11). However, the lesbian outlaw should not be painted as an anarchical figure with disregard for the law. In fact there is an intricate connection to and overt awareness of legal discourse within invocations of the lesbian outlaw. This is the complexity that I want to draw on. Robson argues that the connection between the lesbian outlaw and legal discourse has been "minimised" as legal history has been written and interpreted (Robson, 1992: 30). Lesbian sexuality has been presented as both unimagined by and of no concern to legal systems. Robson contends however, that there is a strong connection between the lesbian outlaw and legal discourse, notwithstanding the contradictions inherent in the situation (1992: 11). In an

Australian context lesbianism has never been illegal, nor has there ever been a specific age of consent for lesbian sex. Comparatively, male homosexuality, was only removed completely from the Australian penal code in 1997 and still harbours a higher age of consent than heterosexual sex in some states. The silence of lesbian sexuality certainly appears consistent with a legislative system unconcerned or unwilling to imagine it. Equally, it would suggest a lesbian outlaw detached from legal discourse altogether. And yet, as Robson points out, this equation is erroneous. Again, in the Australian example, lesbian sexuality has been a pivotal discussion point in courtroom battles for child custody. Women have been denied access to or custody of their children because of their lesbianism (Bateman, 1992). Lesbian organisations have been the focus of covert police surveillance (Joyce, 1998). Court cases have been heard surrounding lesbian access to fertility services (Stuhmcke, 1997). Parliaments have debated the legality, technicality, desirability, moral consequences, the statistical spread and the social ramifications of lesbian sexuality. It is not so much that the lesbian is not in-law, but that the lesbian outlaw is riddled with contradiction.

2. Plurality

Whilst contradiction, particularly when it relates to the status of being in law or out of law, may imply a dualistic rationality, I want to contend that the lesbian outlaw is characterised by plurality. The nature of this plurality stems from the simultaneous intersectionality of discourse that marks the lesbian outlaw as a subject position. Foucault argues that systems of governmentality encourage people towards singular truths contained within singular discourses (law, medicine, psychiatry etc.) and that the project of governmentality further promotes this sense of singular truths when these discourses interact to support each other. Foucault says of this: "Each society has its regime of truth, its "general politics" of truth: that is, the types of discourse which it accepts and makes function as true..." (Foucault, 1980a: 73). For example in the *History of Sexuality* he argues that homosexuality has been rendered deviant through all three discourses listed above, rendering a singular truth or production of knowledge (Foucault in Sawicki, 1991: 39). The margin of liberty however, (as invoked in the previous chapter) is multi-discursive, and representative of knowledge other to those contained in projects of governmentality. I would argue that this plurality, and the plurality of the lesbian outlaw are one and the same since they represent the same field of power and knowledge. The significance of this is that the lesbian outlaw represents

a fracturing of established theoretical boundaries. At this point the lesbian outlaw fulfils the criteria of taking contradiction seriously by symbolising contradiction itself. More than this however, this fracturing is not simply for its own sake, but in order to legitimate other discursive knowledges and to seek alternative truths. As such, the lesbian outlaw begins to formulate the ability to articulate the effects of contradiction as a legitimate experience.

The utility of this plurality is to articulate and legitimate an 'other' to the either/ or options presented by binary coded thought. Outlaw theorising is often times, interdisciplinary and political, heightening the sense of disjuncture that it poses to established theoretical modes. Maria Lugones, for example, writes with both political and theoretical aims, describing modes of rupturing cultural norms and categorisations. She describes her "mestiza consciousness" as a state of outlawry that refuses cultural assimilation in favour of plurality (1992: 33-34), claiming: "the new mestiza is anchored in the borders, in that place where critique, rupture, and hybridisation take place" (1992: 35). What Lugones articulates so well about the plural outlaw-self, and what is pivotal to its ability to transgress, is its ability to resist. Lugones's mestiza consciousness is Foucaultian in its ownership of resistant power. The new mestiza resists assimilation, resists oppression, resists being made, and instead 'germinates' as a new self, a self possessing of power, whose familiarity is 'risked' because it challenges the power which sought to oppress it (Lugones, 1992: 33). Similar to Lugones, Sally O'Driscoll invokes an image of the outlaw that is based on border crossing and the transgression of norms (1996: 33-35). The function of the outlaw is to "produce a new consciousness that defines identity not by remaining within borders but by crossing or reworking them" (1996: 33). This is firmly in line with my characterisation of the margin of liberty as permeable in the previous chapter and therefore consistent with the notion that the lesbian outlaw exists in this space. In the invocation of crossings O'Driscoll implies plurality as a characteristic of the outlaw. In defining new consciousness as the aim of this plurality, O'Driscoll articulates the utility of the lesbian outlaw.

3. Justice

The third characteristic to mark the utility of the lesbian outlaw is the preoccupation with justice that is found in outlaw discourse. Outlaw discourse, as John Sloop and

Kent Ono describe it, "loosely shared logics of justice, ideas of right and wrong that are different than, although not necessarily opposed to, a culture's dominant logics of judgement and procedures for litigation" (1997: 51), formulates alternative patternings, or imaginings, of the way society, should and can function. It describes and invokes alternatives to dominant discursive understandings and as such, contains within it, the potential to disrupt and challenge the same. Characterised as being in friction with dominant discourse, including law, outlaw discourse is in danger of being similarly characterised as anarchical. Sloop and Ono argue however, that the alternative imaginings of outlaw discourse articulate through them, alternative patterns of judgement (1997: 54-5). Elizabeth Spelman and Martha Minow similarly contend that the outlaw is a figure associated with notions of freedom (1995: 1281) that are pivotal to the development of justice and morality exterior to the mainstream. Notions of judgement, justice and morality then motivate the transgressions of the outlaw. These notions contest the image of the outlaw as amoral or anarchic, but also lend authority to the outlaw transgression, being motivated by a perceived injustice. The role of outlaw discourse then is multiple if it is to maintain its inherent logic and legitimacy. It must articulate its experience of injustice, which may counter mainstream discursive understandings. It must also be able to justify its actions in accordance to this injustice. The transgression must meet moral codes and codes of justice, despite the fact that these often times counter normative mainstream measures. These codes form an alternative knowledge, an alternative imagining that do not necessarily confirm understandings within dominant discourse, but which must nonetheless, be self sustaining and logical.

Outlaw justice then, stands in relation to liberal democratic notions of the same. Specifically, whereas liberal democracy categorises justice as inclusion in-law outlaw justice is reconciled in the margin of liberty utilising resistant power and out-of-law knowledge. Both discourses speak with the same language and motivation towards justice. However, the logic of each differs, as do the understandings and implications of each. Sarah Zetlein gives an example of this using the image of a "chick in white satin" which she defines as "a lesbian who refuses the division between the outside and the inside" (1995: 56)- a description that is similar to the lesbian outlaw. Zetlein's contention is that the law tries to render lesbianism irrelevant to the access of justice (1995: 60), but that lesbianism is often the specific and pivotal characteristic that

denies a woman justice (read in liberal democracy as rights, equality, freedom etc.) within legal codes. The chick in white satin, or the lesbian outlaw then, proposes an other kind of logic and interpretation to justice as presented in dominant discourses such as liberal democracy.

Justice, freedom and liberty are liberal democratic ideals imperative in any engagement with legislative systems. According to Spelman and Minow, it is not that the outlaw does not comprehend these ideals rather, that the outlaw possesses an other understanding, another "morality" as they discuss it, of them. Using the example of the movie *Thelma and Louise* they argue:

like many outlaws and many who seem marginal to the law's operations. Thelma and Louise had complex understandings of the legal system and how it would treat them...Placing at the centre these outlaws' views of the law and morality displaces societal images of the outlaw as amoral (1995: 1290).

This summation of the outlaw reinforces the intricate link between the outlaw and legal discourse as outlined by Robson, discussed above. More than this however, it also encourages an understanding of outlaw as resistant discourse, which indicates the purpose in utilising the lesbian outlaw in a critique of liberal democracy. The lesbian outlaw creates the dual purpose of understanding the dominant discourse and displacing it, as described by Spelman and Minow. This then, gives the lesbian outlaw a specific purpose that is to consider the function and effect of contradiction within both theory and society, another key criteria marking its utility. The lesbian outlaw counter poses dominant theoretical and social orderings with those that stem from and represent contradiction. This new knowledge brings contradiction to the fore and forces examinations of the same through conflict with dominant discourse.

The lesbian outlaw functions with a preoccupation with justice that the theorists explored above have articulated and as such, believe the lesbian outlaw is an apt discourse with which to examine legislative systems. What is particular about her notion of justice, however, is that her feminist and lesbian ideologies inform it rather than legalisms such as human rights or the rule of law. The significance of this will be explored below.

4. Lesbian⁴⁸

The emergence of lesbian theories often represents the separation of lesbian from feminist, gay-and-lesbian, queer, and other theoretical groupings. The lesbian outlaw emerges as a theoretical figure attempting to represent, re-present, position, untangle and articulate lesbian sexualities and concerns. The lesbian outlaw is outlawed in practical ways by laws and societies, outlawed by theories which seek to amalgamate issues or categories and make sexuality a negligible factor, and the lesbian outlaw actively pursues outlaw status whether it be through the inclusion of separatist politics or simply the act of privileging lesbian sexuality in theoretical pursuits. The sexuality and politics of the lesbian outlaw are far from incidental in the development of a standpoint with which to examine legislation dealing with lesbians and (although to a lesser extent) gay men. The first potential that the lesbian outlaw's 'sexuality' allows is to establish a theoretical alignment with the feminist works of the lesbian-as-other discussed above. This lends continuity to the discourse in terms of feminist theorising and positions the lesbian outlaw as a standpoint. The potential of 'lesbian' however, is also more specifically related to the experience of lesbians within the law (explored in Chapters Seven and Eight). Robson employs the image of the lesbian outlaw in her argument for a lesbian legal theory, a theory that privileges the needs of lesbians in its legal theorising and addresses the practicalities of "lesbian survival" (1992: 11). The potential of the lesbian outlaw then is to deal with the experience of sexuality within legislative systems. Ulterior to projects of governmentality that correlate homosexuality with deviance, the plurality and contradiction of the lesbian outlaw allow a more visceral theoretical knowledge of 'lesbian' that corresponds more closely with individuals' knowledges of their lesbian sexuality. Again, this will be explored in more detail in the two concluding chapters of the thesis. What it indicates here is that the lesbian outlaw is intricately connected to lesbian lives and as such is similarly connected to the contradiction that fashions such experiences.

The significance of these two potentials should not be underestimated. The specific of sex that the PRA contains, and which liberal democracy has been shown unable to comprehend, can be considered through the lesbian outlaw. If we are to return to Neil

⁴⁸ I do not mean to essentialise what may be experienced as 'lesbian' when employing this term. See discussion in the "Introduction" and in Chapter Seven for clarification on how the term 'lesbian' is being used throughout this thesis.

Curtis's argument outlined in the previous chapter, that bodies have been inscribed by legalisms in an attempt to contain their potential that is prior to the law, then the potential of this otherness of the body can also be read within the lesbian outlaw. Curtis argues that the law is always in friction with the outlaw body. Incapable of articulating the sensuality (the *aesthesis*) of each individual body he argues, the law instead attempts to inscribe a physical knowledge (the *aesthetic*) of the body (1999: 264). In a Foucaultian sense, law attempts to *know* the body in order to *govern* it. However, as Curtis contends, the (outlaw) body possesses a freedom that the law cannot rationalise nor contain. This process is aptly illustrated through the lesbian. Unlike the situation for gay men, lesbianism in itself has never been illegal in Australia (Luker, 1999: 5) and yet, the lesbian is still a deviant figure in law. The lesbian body has been rendered deviant via legal sanctions throughout history, however, this deviant knowledge is fractured and contradictory because it consistently fails in being comprehensive. The in-law-lesbian, her history, her relationships, her citizenship and her criminality, exist as fragments of a whole not quite articulated. Her sexuality is clothed in euphemism and innuendo, being significant and irrelevant in the same moment. Punishable without being criminal, regulated without being articulated, protected without being recognised, this fragmentation is both historical and current, and serves to illustrate the complex and yet non-coherent description of the lesbian-in-law. This inability to reconcile the lesbian body in law, not only illustrates the failure of the law to comprehend and manage bodies, but points to the other freedom that it acts to contain. The lesbian body, as Wittig (1986) has discussed in her book of the same name, is a complete visceral self when other-to-law. Because of the direct linkage to the lesbian body the lesbian outlaw possesses this other knowledge, this freedom to exist and inquire beyond norms and deviance and the ability to function with contradiction, making the lesbian outlaw a useful standpoint from which to analyse the PRA.

The lesbian outlaw is also characterised by an impetus towards lesbian feminist politics and theory. Sheila Jeffreys (1993) and Kathleen Kennedy (2000) both insist on the accordance of this political affiliation to the lesbian outlaw.⁴⁰ Through the

⁴⁰ Whilst Jeffreys specifically titles it the 'lesbian outlaw', Kennedy discusses the 'sexual outlaw', who is lesbian. I am reading these as very similar characters.

development of lesbian politics and feminism, and the debates that characterised these, the lesbian outlaw appeared in theoretical thinking. Jeffreys and Kennedy both note that outlaw figures first appeared in such theorising as a critique of (western) lesbian feminism. Sexual outlaws, Kennedy explains, was the label given to "lesbians in opposition to and contemptuous of the lesbian and cultural feminisms of the late 1970s" (2000: 152). This being said however, the outlaw critiqued such theorising with lesbianism still at the fore: "The sexual outlaws claimed that this reconstruction more truthfully represented the lesbian and the challenges she posed to male dominance and heterosexism" (Kennedy, 2000: 152). These two points concrete the lesbian outlaw's utility in the quest outlined by the thesis. If we are to assume, as Jeffreys and Kennedy have, that the lesbian outlaw offers critiques to patriarchy and heterosexism, then its utility becomes obvious in the critique of liberal democracy. As feminist jurisprudence has indicated, laws, legal systems and legal theory have set patriarchal and heterosexist foundations. This will be explored in the proceeding chapter. What is pertinent here to argue is that the lesbian outlaw, because of the lesbian specific, is a discourse that is crucially linked to liberal democracy because its function necessarily critiques this dominant discourse and because it is produced through liberal democratic discourse.

The specific of lesbian contained in the lesbian outlaw also relates to the notion of justice discussed above. Sloop and Ono, for example, insist on the importance of outlaw discourse and judgements being based in the "practice of every day life" (1997: 60). This judgement can be read as alternative patterns of justice emanating from the outlaw. The specific of lesbian in this way becomes key to the development of justice and, as Sloop and Ono argue they necessarily do, the ways in which these notions of justice differ from those that are dominant. This is key to the utility of the lesbian outlaw because it specifies the key site of contestation between the discourses. If we are to believe that outlaw discourses are multiplicitous in nature, then we are to expect that the notions of justice are equally multiplicitous. The specific of lesbian means that the notions we can find in this particular discourse will emerge from the experiences and practices of lesbians. When we use it to critique a discourse such as liberal democracy then, we are not simply posing an other knowledge, but one which is, in the first instance outlaw, or other to dominant logic, and, in the second instance, sexualised. That is, a discourse that is self consciously lesbian, understood in a non-

binary fashion (as earlier discussion of plurality has suggested and as the discussion of feminism in the following chapter will further support).

2.3 In and Out: defining the lesbian outlaw

The image of the lesbian outlaw that I draw in this section resonates with a number of other 'outlaw' works in a range of disciplines, some of which I have described above. In particular, my invocation of the lesbian outlaw draws on the four characteristics I have generalised from the literature. However, the purpose of developing the lesbian outlaw (as outlined in the previous chapter) is to highlight and challenge specific deficiencies that I have located in liberal democracy. Primarily, I aim to use the lesbian outlaw to account for lesbian sexuality within laws, legal systems and theory. This will then be put into practice with an analysis of the PRA. In order to do this however, I need first to draw on the analogies between liberal democracy and the lesbian outlaw to indicate the ways in which the lesbian outlaw can act as a subversive counter to the former.

My formulation of the lesbian outlaw takes two key guises: as a representative figure of the lesbian citizen (a *subject position*); as a politico-legal *discourse*, one that acts as a counter discourse to liberal democracy and can challenge and critique legal systems in practice. These are designed to be analogous, and yet subversive to the formulation of liberal democracy (Chapter One). The lesbian outlaw subject position is a citizen figure constructed, as in liberal democracy, through specific laws (such as the PRA) and discourses (such as legal systems). Unlike the citizen of liberal democracy however, the lesbian outlaw subject position is specifically sexed and gendered. This means that sexuality is key rather than incidental to the ways in which laws and legal systems interact with the lesbian outlaw. As a politico-legal discourse, the lesbian outlaw is also analogous to liberal democratic discourse, which offers explanation and instruction on the proper function of laws, legal systems and citizenly interactions. Again however, lesbian sexuality, theory and political viewpoints (Chapter Three) are self conscious to the lesbian outlaw, replacing the universal, 'neutral' character of liberal democracy that feminist jurisprudence, amongst others, has questioned. Through this counter discourse the lesbian outlaw can offer a specifically lesbian viewpoint on the function of laws and legal systems. This offers a contrast to liberal democracy where measurements of the 'proper' treatment of people in law are made against ideals such as equality and

freedom which function at best, irrespective of gender, sexuality, race and other variables (Chapter One). The lesbian outlaw then, is brought to challenge the neutrality of liberal democracy and to make account for the experiences and potential stemming from lesbians' interactions with laws, legislative systems and theories.

There is a wide literature of critique levelled at Foucault's work and the contention of the subject and as such, some note must be made of why I invoke the lesbian outlaw as a subject position. Margaret McLaren for example argues that Foucault lacks "an adequate theory of the subject" (1997: 109) and that many feminists have taken this to equate with a lack of agency in Foucault's work. I am of the opinion, like Hall above, and others, that this is a misreading of Foucault's work and intent. As C. Colwell claims, it is not the material body that Foucault denies, but rather the "originary subject"- the subject 'beyond' discourse (1994: 65). To my mind this figure is like the 'truth' or the ultimate emancipatory state that Foucault also writes against (see later discussion in Chapters Four-Six). This being said, there is also a necessary distinction to be made between 'subjects' and 'subject positions'- the latter being the term that I am using. Hall argues that the subject in Foucaultian thought are "figures who personify the particular forms of knowledge which the discourse produces...the madman, the hysterical woman, the homosexual..." (1997: 56). I make reference instead to the subject *position* (until that is, in the final two chapters, when the issue of subjectivity and agency will be considered in greater depth) which, as explained below, are more involved in the production and interpretation of knowledge.

The lesbian outlaw as a discourse and as a subject position are specifically Foucaultian formations. According to authors including Stuart Hall the two are essentially connected in Foucault's work:

Discourse...produces a *place for the subject* (i.e. the reader or viewer, who is also 'subjected to' discourse) from which its particular knowledge and meaning makes most sense. It is not inevitable that all individuals in a particular period will become the subjects of a particular discourse in this sense, and thus the bearers of power/knowledge. But for them- for us- to do so, they- we- must locate themselves/ourselves in the *position* from which the discourse makes most sense, and thus become its 'subjects' by 'subjecting' ourselves to its meanings, power and regulation. All discourses, then, construct subject positions, from which alone they make sense (1997: 56).

The significance of this lies in the multiplicity of discourse as Foucault describes it, and the power/ knowledge nexus located within discourse. If a dominant discourse, such as

legislation, can create specific 'knowledge' and subject positions that are dominant or deviant, then resistant discourse must be able to create other ways of knowing and other subject positions in contrast. Through these other subject positions then, there is the potential for the exploration of other knowledges and there is the potential for agency and power to be assumed by 'subjects' that are otherwise 'subjected' to deviant rationalities.

It should be noted however, that there is an inherent danger in invoking plurality that the lesbian outlaw may be read as employing post-modern notions of endless discourse. The death of the author, and endless reuse of signifiers, the end of history and the inability to produce original thoughts, are all dangerous notions if employed incorrectly because they insinuate a futility with theorising and a perpetual process that has little concrete offerings. This is not how I envisage the plurality of the lesbian outlaw. I present the plurality as an obvious alternative and in response to the type of problematic theorising liberal democracy and 'in-law' theorising poses. Although I contend that the lesbian outlaw is beyond the project of governmentality this is not the same as saying the lesbian outlaw is beyond discourse. As I discussed earlier, the plurality of the lesbian outlaw is firmly grounded in legal discourse, which gives it direct legalistic purpose. It is an alternative to in-law theorising such as liberal democracy not because it overwrites or eradicates it but because it takes to it plurality, power and knowledge from the margin of liberty. The parameters of this plurality are also set in the two other characteristics explored below- that of a preoccupation with justice, and a focus on lesbian feminist ideals, again, giving this plurality both purpose and grounding.

"(O)utlaw discourse" or lesbian outlaw discourse as I use it in this work, is a concept I have coined from rhetorical theory, particularly from the works of John Sloop and Kent Ono (1997; 2002). However, this is a coinage that is loosely based since I do not intend to engage with the various levels of debate involved in rhetorical theory itself. What Sloop and Ono do however is to articulate the function of outlaw discourse that my invocation shares. They describe outlaw discourse as both a way of imagining outside of dominant discourse and recognising subjectivity outside of dominant constructions. Through these things outlaw discourse also and most importantly, is presented as a way of challenging and disrupting the logic and function of dominant discourses. Outlaw discourse searches for the agency of the margins and seeks to juxtapose this with

dominant logics in order to create friction, movement and change. If we are to read liberal democracy as a dominant discourse, then outlaw discourse would seek to challenge it from the perspective of the margins. More overt than simply juxtaposing and destabilising however, outlaw discourse also seeks to make judgement on the conflicting rationalities that it makes visible. For Sloop and Ono, the primary purpose of studying outlaw discourse is to take the logic of outlaw judgements and explore the applicability of these to dominant judgement processes. Using the language of Sloop and Ono then, the function of outlaw discourse in the thesis takes two main forms: to provoke "a space for the imagination of different ways of operating and talking" (1997: 66) based in the margins (that is, to examine the PRA from a lesbian outlaw perspective); and to take this back to dominant logics (in this case, liberal democracy) in order to explore the ensuing implications.

In creating juxtaposition and conflict, outlaw discourse encourages multiplicity and contradiction. I want to support my assertion that the lesbian outlaw takes contradiction seriously in a concrete manner using this premise that contradiction is inherent in the lesbian outlaw. I would hold that the lesbian outlaw must reconcile contradiction in order to function and that this reconciliation is done with plurality rather than singularity at the fore. What I mean by this is best understood in relation to my previous characterisation of liberal democracy. I have argued that liberal democracy reconciles contradiction, or else refuses to acknowledge it in order to promote singular and ultimate concepts such as equality and rights. The lesbian outlaw by contrast, exists with functioning contradiction. I offer this argument by way of analogy to lesbians within the liberal democratic state of NSW, since I have argued that the lesbian outlaw is representative of this same space. Under the PRA, lesbian relationships are granted certain legal rights and protections and a degree of legal visibility. This recognition however is contradicted by an almost uniform oversight of lesbian relationships involved in child rearing, measured in terms of legal recognition. A recent report produced for the NSW Gay and Lesbian Rights Lobby claimed that approximately 15-20% of lesbians in this state are currently engaged in child rearing and that this figure was likely to increase by perhaps up to 20% within the next five years (Millbank, 2002: 20-21). This type of contradiction leads to a plurality of knowledges that are necessarily reconciled within the lesbian, or else she leads a schizoid existence that is not sustainable. It could be argued that the symbolic figure of law is never wholly

representative of any individual citizen and that as such, citizens and legal systems will always contradict each other to some degree. However, I would argue in response that lesbians are positioned in ways that require living with or through contradiction, and exist simultaneously in and out of the law. The historical legacy of this trend, its systematic and often times conscious nature⁵⁰ marks it so significantly and leads me to believe that the reconciliation of this plurality is worthy of note. The lesbian outlaw possesses this reconciliation of contradiction without the type of assimilation found in liberal democracy, because of the politics and sexuality associated with the discourse (discussed previously), and this in turn enables it to take contradiction seriously.

This is a self-conscious invocation- contradiction is not only the effect, but also the cause of outlaw discourse. Outlaw discourse is alternative, contradictory judgement to mainstream discourse. The function of outlaw discourse, however is not to superimpose or displace this mainstream discourse in order to dispel contradiction. Rather, the quest is to provide a reflective space where the two logics can co-exist and undergo some form of symbiosis- or at least an experience of growth and alteration. As characterised by Robson earlier (1992: 11), essential to the lesbian outlaw is a direct, although not exclusive, linkage to liberal democracy and law. Key to understanding my choice of invoking the lesbian outlaw is comprehension of the role liberal democracy plays in constructing this position. The first way of doing this is to illustrate the discursive production of the lesbian outlaw through legislation such as the PRA. The contradictions found in Foucault's work on sexuality (discussed in the previous chapter) provides an interpretive framework for the PRA. Using it, we can understand it not simply as an act of liberatory type legislation (the liberal democratic frame) but additionally, as a constructing agent of (deviant) sexuality. Through the PRA this contradiction comes to fruition. At the same time that the PRA confers legal rights to lesbians and gay men, it does so within a system of management that necessarily renders homosexuality deviant. This is where Robson's explanation of the lesbian outlaw- as both within and out of the law- can be illustrated. This, as the above example of Beth and Jill indicated, is the effect of the PRA- it formulates lesbians and gay men as being both inside (a legally recognised partner for Acts such as *Compensation to*

⁵⁰ This consistency, for example, is seen in the refusal of amendments to incorporate lesbian and gay relationships into superannuation laws in the Australian Federal Parliament every year since 1998. See: "Superannuation (Entitlements of Same Sex Couples) Bill 1998": 1999; 2000; 2001.

Relatives Act 1897; Wills, Probate and Administration Act 1898 and the Human Tissue Act 1983) and out of the law (a non-legally recognised partner under Acts such as *Industrial Relations Act 1996 and Teaching Services Act 1980*⁵¹) in the same moment.

The second key to understanding the linkage between the lesbian outlaw and liberal democracy is to consider the discursive placement of the lesbian outlaw using a governmentality framework. In this way the lesbian outlaw can be conceptualised as being located within a resistant discourse, a discourse located in the margin of liberty. In a Foucaultian sense, such discourses are not other to mainstream discourse (such as liberal democracy) but rather circulate through and within the same power relations. He argues: "(d)iscourses are tactical elements or blocks operating in the field of force relations; there can exist different and even contradictory discourses within the same strategy" (1980a: 102). What this means for the lesbian outlaw is that although at times this discursive construction stands (as resistance) to challenge liberal democracy, it is both a consequential construction of liberal democracy and circulates within the same power relations. There is no clear divorce then between the lesbian outlaw and liberal democracy.

The lesbian outlaw is intricately linked to liberal democracy, and therefore capable of considering the constructions of the same. It is also overtly marked by contradiction and again, therefore able to articulate and comprehend it. Throughout the thesis the lesbian outlaw will be used in two key ways that correspond with these criteria. It will be used to offer a critique of liberal democracy and, more specifically, the construction of the PRA through liberal democratic discourse. It will also be used to offer alternative ways of 'knowing' the legislation and the relationships of women that the legislation describes/ produces.

I have said however, that my coinage of outlaw discourse is only loosely based on Sloop and Ono's work. My invocation of outlaw discourse takes the broad principles outlined by Sloop and Ono and develops them in a number of key ways to make it specific to the task at hand. There are two tiers to this task. The first has been to examine the characteristics of outlaws, outlaw theories and other invocations to

⁵¹ This Acts has since been amended to include the definition of de facto partner found in the PRA.

ascertain the characteristics that mark the utility of the lesbian outlaw to the exercise of examining the PRA (and other similar laws). Specifically, these are an engagement with legal systems and an ability to comprehend and articulate sexuality beyond hierarchical binary notions. The second task, taken up in the proceeding chapter, is to examine the characteristics of knowledge produced through lesbian outlaw discourse. This is done through an examination of the theoretical lineages of the lesbian outlaw and an interrogation of two key concepts- truth and silence- that I believe become tools of analysis utilised through the lesbian outlaw.

2.4 Conclusion: The utility and limits of the lesbian outlaw

At the outset of this chapter I argued that the utility of the lesbian outlaw in analysing legislation such as the PRA can be measured against its ability to fulfil the three essential criteria for taking contradiction seriously- the ability to articulate and comprehend contradiction as legitimate experiences and symbolic states and the ability to understand the function of contradiction within theory and society. Each of these I have demonstrated through explorations of various theoretical incarnations of outlaws and specifically lesbian outlaws. I also argued at the outset that the utility of any concept used to critique legislative discourse must not have disregard for liberal democracy and must be able to represent the dual function of liberal democracy within projects of governmentality- to enable and to manage. The lesbian outlaw sits in an uneasy and contradictory position with relation to legal discourse. In particular, a key characteristic of the lesbian outlaw is an overt formulation because of legislative omission based on lesbian sexuality. In the literature surveyed the lesbian outlaw emerges in direct response to contradiction within legal discourse. As such, I believe that the lesbian outlaw emerges specifically from the contradiction of the PRA as I will discuss throughout the thesis. Because of these criteria fulfilments the lesbian outlaw has great utility in taking contradiction seriously and hence in being used to examine legal situations such as the PRA.

I have argued that the lesbian outlaw can be considered as both a discourse and subject position within the Foucaultian understanding of the terms. The lesbian outlaw exists through an understanding of the margin of liberty, as an imagining 'other' to binary dualisms. In doing so, it deflects notions of norm and deviance. The lesbian outlaw is

resistant power, situated within the margin of liberty and as such, is not so much the binary term of in-law, as the 'other' to dualistic thought. Foucault's margin of liberty is crucial to this quest in feminist legal theorising because it provides a feasible access point to this plurality (resistance) and a vehicle for its negotiation (discourse other-to-law). Foucault's work on governmentality provides firm support and structures for this kind of theorising, however, its lack of feminist consideration, makes it problematic if its utility is for feminist goals. I would argue however, that Foucault's notion of binaries and the potential of the margin of liberty, overtly correspond with the feminist notion of the 'other' and I propose a combination of the two to provide a feminist theory capable of taking contradiction seriously in legal theory.

The lesbian outlaw is specifically lesbian in its focus, which means that it deals with notions of feminism, sexuality and the body. The lesbian outlaw is a fracturing discourse that deals with a plurality of possibility and in the process, takes contradiction seriously. As such, it does not possess specific theoretical tools with which to sociologically analyse. The strength of the lesbian outlaw is its ability to articulate and comprehend contradiction. Its limitation is that it cannot theorise without set tools. The lesbian outlaw as I have described, provides outlaw strategies, directions on how and why contradiction should be taken seriously within legal theorising. The development of theoretical tools that the lesbian outlaw could utilise is the quest of the next chapter. This quest, as has been foreshadowed in the many links I have made throughout this chapter, means combining Foucaultian theoretical elements with the lesbian outlaw standpoint and a feminist theoretical lineage. This means accepting Foucault's theoretical work as a "toolbox" (as advocated by Foucault himself: Foucault and Delueze, 1977: 208) of useful elements of theoretical insight and direction towards practical social deconstruction. It involves using Foucault's concepts of sexuality, power and governmentality to provide an alternative reading of the PRA, which focuses on contradictions. It also involves employing the lesbian outlaw to understand these contradictions as intrinsically and significantly connected to gender, sexuality, and social and historical traditions of privileging hetero-normative structures.

Chapter Three

Truth and Silence: Knowledge and the Lesbian Outlaw

Suppose we are to ask ourselves simply: What does a woman need to know to become a self-conscious, self-defining human being? Doesn't she need a knowledge of her own history, of her much politicised female body, of the creative genius of women of the past- the skills and crafts and techniques and visions possessed by women in other times and cultures, and how they have been rendered anonymous, censored, interrupted, devalued?... Doesn't she need to know how seemingly natural states of being, like heterosexuality, like motherhood, have been enforced and institutionalised to deprive her of power?... I suggest that not anatomy, but enforced ignorance, has been a crucial key to our powerlessness (Adrienne Rich, 1994: 1-2)

3.1 Introduction

This chapter proposes the theoretical approach I will take in analysing the *Property (Relationships) Act 1984 (NSW)* throughout the thesis. In the previous chapter I proposed the lesbian outlaw as counter to the liberal democratic citizen and argued that outlaw strategies, stemming from the power/ knowledge nexus, could aid in legal analysis and theory. I also asserted, but did not demonstrate that the lesbian outlaw as it has been used in various analyses has been lacking in theoretical rigour. In this chapter I aim to address this deficiency of the lesbian outlaw. With lineages that are both Foucaultian and feminist, truth and silence are proposed as tools that are insightful into the discursive production of the PRA, and essential to the quest for outlaw strategies in legal theory. This section explores the two notions of truth in plurality and silence as vocality. In doing so, it articulates the power/ knowledge nexus of the lesbian outlaw which in turn leads to the location of outlaw strategies that can be taken to legal theorising.

This chapter begins by problematising the notion of silence. Foucault and many feminist theorists have argued against a simplistic understanding of silence. Foucault argues that silence is not the antithesis of chatter rather, its necessary condition (1980a: 35). Further, he argues that silence, like truth, is multi-discursive and what is silence in one discursive reading may be chatter in another. This chapter takes up Foucault's suggestion and argues that feminist traditions, such as the writing of women's histories, the publication of women's journals and diaries and similar pursuits, are based on a

similar understanding that silence is not simply repressive, nor is it representative only of voids/ absences. The second theoretical concept examined in this chapter is the notion of truth. It argues that in establishing 'truth' the law sets up a dichotomy of norm and deviant, a process not dissimilar to 'othering' described in feminist works. Given this, it argues for a reading of truth as politically and discursively situated, and argues for a consideration of 'other' truths as legitimate. This theoretical exploration then, focuses on Foucaultian and increasingly, feminist, explorations of truth in an attempt to explicate other knowledges and their potential as sites of resistance.

A synthesis of aspects of Foucault's work and the feminist ideas above is presented below which also forms the theoretical foundation of the lesbian outlaw. What links these two lineages is the transgressive intent with which they have been formulated. Feminist engagements with truth and silence commonly engender the terms with notions of empowerment, a similar goal to Foucault's discussion of the reciprocity of power relations. There is more to this synthesis however, than outlining the myriad of similarities and differences between the two approaches to these concepts. Certainly, an element of description and history is necessary for thorough understanding however, as Jean Grimshaw has advocated, the focus of this theoretical union needs greater specificity. She argues: "It is... a question of what affinities there are between some of the questions that feminist theory has addressed and those that Foucault addresses, and what sort of a dialectic can be created between these" (1993: 52). This chapter begins the process of articulating this dialectic of theoretical questions and examining their utility. What is important to note however, is that these will subsequently play out and be explored further throughout the proceeding chapters and will culminate in a chapter of reflection prior to the conclusion of the thesis.

3.2 Silence

Silence and Law

The majority of agitation for reform, for example legal reform to include the relationships of lesbians and gay men, is founded on a liberal democratic framework where legislative silence is read as absence/ omission and hence repression. In 1996 for example, Stevie Clayton, writing for the NSW Gay and Lesbian Rights Lobby made

this connection overt in her characterisation of the treatment of lesbians and gay men under Australian law:

There are many gay men and lesbians, (and solicitors) who really have no idea about the extent of the discrimination experienced by people in same sex relationships, or about the sheer volume of legislation which makes our relationships invisible. Many of them have never had recourse to the law; have never had a lover unconscious in hospital; or die of a terminal illness; or had a relationship breakdown that ended in court... (Clayton, 1996)

In this equation, lack of legal recourse is the same as invisibility and the effects of that invisibility are not only discriminatory but also repressive. Clayton's description is quite accurate. However, as examples in previous chapters have indicated, the apparent silence of lesbians and gay men in such legislation is not in actual fact indicative of a general silence, ignorance or absence in law. The silence or absence of lesbians and gay men from something like relationship laws, which the PRA sought to address, instead functions on two levels. The silence acts as a barrier to lesbians and gay men in terms of legal enablement. Foucault's work suggests that the silence also acts to mask what is in actual fact a speaking process where homosexuality is spoken into deviance (Horrocks, 1997: 90). Homosexuality is not actually silent- but rather formulated quite specifically through the process of speaking sex (Foucault, 1980a: 56).

In the specific example of the PRA we can see that the silence of lesbians and gay men in some areas of legislation, such as superannuation laws, is actually located within a broader process of speaking sex where homosexuality is explicitly rendered less than, or deviant to heterosexual relationships. This is seen in the conscious description of two types of intimate relationships in NSW law- heterosexual and homosexual, the latter being less enabled than the former. The silence in superannuation laws actually fits into a broader talking process and cannot simply be read as absence in need of substance through Acts of parliament. Such a situation is hinted at in Clayton's assessment- "the sheer volume of legislation which *makes* our relationships invisible" (1996, emphasis added), but this is overridden in favour of liberal democratic rationalities. For example, Clayton later calls on notions of injustice to characterise the situation and to prompt law reform. Rather than examining the contradiction of laws *making* lesbians and gay men invisible, the situation is read in binary liberal democratic terms where invisibility must be overcome by visibility:

The legal recognition of same sex relationships will be the most significant change for lesbians and gay men in recent times, not just because it requires major legislative

reform... but because it will change both the way society looks; at us and the way that we look at ourselves (Clayton, 1996).

The inability of liberal democratic theory to come to terms with this notion of silence, however, is common and, I would argue, to the detriment of lesbian and gay legal reform. Martin Duberman (1997) illustrates the constraints of being unable to articulate a subject position outside of the dominant legal notion of lesbians and gay men in the United States of America (USA). He argues, the difference between heterosexuality and homosexuality exists. Likening this difference to the literary distinction between Jewish and non-Jewish writing, he argues that the articulation of this difference is not easily pinned down: "Sometimes, in other words, one can sense the presence of the unfamiliar or the offbeat without being able fully to articulate its properties" (1997: 9). As a preface to a legal text this remark, to me, appears curious. In so many ways, particularly in reference to the American example he is discussing, the legislative system has articulated this difference quite precisely.

As Ruthann Robson has discussed elsewhere, the American legal system has articulated sexual practices, social groupings, families and even acceptable dress practices in terms of what is heterosexual and acceptable, and what is gay or lesbian and hence, unacceptable (1992: 47-59). The only 'sensing' of lesbian and gay difference in legal terms perhaps can be found in policing, and in particular, on the police raiding of lesbian and gay bars or the homes of lesbians and particularly gay men (Willett, 2000: 10-11). Certainly, in this situation, the sensing of lesbians and gay men must have played a role, in the absence of any directly threatening and public crime. But even then, two men arrested for having sex in a public toilet, or in Robson's example, two women lying together on a stretcher in a tent, in the middle of nowhere, once 'sensed' are placed on trial, and the specifics of their homosexuality articulated in no uncertain terms (1992: 49). The courtroom wants to know where fingers and tongues and other bodily pieces were placed, and according to state definitions, can judge whether this was 'homosexual sex' (Robson, 1992: 47-59). The courtroom, the police, the people on trial can all, *and are all required*, to articulate the difference which was being played out and which is being penalised through the legislative system. Through such examples, the difference between heterosexuality and homosexuality appear clearly constructed through the law, even if homosexuality is silent in legislation. The failure to analyse such constructions through silence necessarily hinders productive engagement

with legislative systems for lesbians and gay men because it oversimplifies the situation and proposed solutions.

Foucault's work, particularly in *The History of Sexuality* points to this inconsistency of thought. Too often, difference is internalised, rendered natural and inevitable (Foucault, 1980a: 83; Martin, 1996: 190). At the level of governing however, the level of social organisation, these divisions can be traced in a tangible manner. The construction of sexuality, he argues, divides society into same/ different, norm/ deviant categories (Foucault, 1980a: 83). Through systems of governing like the legislative system these differences are not only articulated but also created. Sexuality does not exist in terms of difference simply because we 'sense' some ten percent of the population have desire for the same sex,⁵² it exists because the social system in which we live and understand ourselves gives that fact meaning. It articulates that desire, describes the way in which it exists in a physical sense, and then designates meaning to it. Our social system of understanding orders homosexuality as different and deviant. This understanding is articulated and renewed throughout social systems, one primary system being the legislative system to which we defer readily for how the world should look and behave. In understanding this construction of sexuality we begin the process of untangling difference and the negative connotations associated with it. The term *construction* is key (Foucault, 1980a: 105). In Foucault's works the construction of these governmental divisions are explored, and the processes that render them 'natural' are exposed. Hence, Foucault's call for the unravelling of the "deployment of sexuality" cast in the first volume of the *History of Sexuality* (1980a: 75). Part of this process is to describe the ways in which difference as deviance has emerged. The other is to articulate this 'difference' in other ways, using resistance.

Both these processes are indicative of outlaw strategies and begin to formulate links between the lesbian outlaw and silence. In the previous chapter I characterised the lesbian outlaw as resistant discourse and argued that plurality and contradiction were two of its key markers. The project of articulating difference in a manner other than

⁵² This is a common estimation. Jenni Millbank argues that the studies of Shere Hite provide more reputable statistics (11%-18%) but argues too that such estimations are fraught with difficulties (Millbank, 2002: 18).

silence can begin with the power/ knowledge of the lesbian outlaw. Foucault argues that we should:

aim – through a tactical reversal of the various mechanisms of sexuality- to counter the grips of power with claims of bodies, pleasures and knowledges, in their multiplicity and their possibility of resistance (1980a: 156).

The notion of multiplicity here is what I think is directive to the articulation of difference beyond deviancy within legal thinking. Multiplicity is also the inroad, I believe, into legitimising outlaw strategies which are necessarily characterised by multiplicity, in legal theory. Duberman concludes his preface with the following statement: "...one should always remember that differentness is not a disability nor a deficiency. It is another way, not a lesser way" (1997: 9-10). He argues that difference has the ability to alter perceptions of what is mainstream however, he does so within a framework that accepts a binary understanding of difference. Duberman only asks that difference be de-demonised, rather than questioning at all the differences themselves and the processes of their construction. The lesbian outlaw, by contrast, is difference in a dualistic fashion- difference by virtue of its subject position and by virtue of its resistant power. The lesbian outlaw is constructed as deviant through dominant discourse however, this is not the sum total of its existence- there is also resistant power with which the lesbian outlaw can challenge, disrupt and displace dominant discourse.

Duberman demonstrates an inability to articulate an other sexuality, which is different but not deviant, without attempting to address why deviant and different have arisen together. Difference and deviance exist in a nexus type relationship in the legal articulation of homosexuality. The silence of difference as a construction, to the point of its naturalisation, acts in many cases, to make this relationship invisible. Foucault's work allows us to see that the function of silence in the creation of homosexuality as deviance is strategic in nature. The logic of difference as deviance makes sense only if no other logic or possibility is articulated. One could argue, given Foucault's work on the construction of deviant sexualities, that without careful examination of how homosexualities are spoken and the implications of these deviant creations, the potential to think of "differentness" in any way other than deviant, will not be met. The challenge as Foucault articulates it, is not so much to prove that "differentness" is legitimate, but that it has been created, spoken into being. Any reading of law as simply 'lacking' lesbians and gay men interprets this 'difference' too benignly and grants silence too

simplistic a function. It also eradicates the possibilities contained within outlaw discourse and specifically within the lesbian outlaw. As precursors to this however, the following sections articulate the Foucaultian and feminist theoretical lineages that bring such theoretical possibilities into being.

Foucault and Silence

Foucault's image of the sexual society is as a ceaseless audible chatter.⁵³ A room full of people talking will be heard as a buzz of noise from a distance, but actually consists of a series of conversations, which can be heard and distinguished as such at a closer range. Each conversation is separable, although as people move throughout the room, and new groupings form, the conversations intertwine and overlap. At this micro level, each conversation and group of conversers, seem independent and internally logical. At the macro level, however, as a series of groups and a series of simultaneous conversations, the large group illustrates Foucault's ceaseless chatter. An audible mass, which actually comprises of individually logical strands of conversation. The paradox of speaking sex is silence. Foucault claims that an artificial silence is commonly constructed around sex making it seem as if silence (as repression) is the natural state of sex and sexuality. He comments: "What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the secret*" (1980a: 35).

And so we speak. With each other, to each other, about each other. But what of the person within the group, who has nothing to say? She knows nothing of the topic, so she is silent. She has never met the people about whom the conversation revolves, so she is silent. Do we assume that because she does not contribute to the conversation, that she is mute? Or do we assume, that she has nothing to contribute on the topic, but given another situation, another topic, she would speak? For Foucault, silence is not the binary of chatter. The choice is not an arbitrary one of speak or be silent. Rather, both work together. Silence "functions along side the things said, with them and in relation to them within over-all strategies" (Foucault, 1980a: 100). A conversation is dependent on

⁵³ Foucault argues: "Rather than as a society committed to the repression of sex, I see our society as dedicated to its 'expression'...a certain nearly invisible mechanism makes sex speak in a virtually inexhaustible chatter. We are in a society of speaking sex" (1980a: 95).

silences. One person talks, the others are silent. It is not that they cannot talk, or that they do not talk, but that silence is as much a part of the conversation process as talk.

If this room of conversation was translated into Foucaultian theory on sexuality, then the conversations would not simply be “speaking sex”, but speaking heterosexuality. Each grouping of people in conversation, could be read as a discourse where sex is spoken-legal systems, medicine, schools, governments (Foucault, 1980a: 98). In particular, Foucault would argue, a knowledge that privileges heterosexuality as the norm and any alteration of that, as deviant. However, the conversations themselves, the knowledges themselves, are not all that become of interest in a Foucaultian analysis. Two other points of significance also arise. The first point of interest for Foucault, is the context of legitimacy in which these conversations are taking place. Who speaks and who listens to this chatter is as much a concern as what is being said (Foucault, 1980a: 11). The play of power is a central Foucaultian concern, and the perception of legitimacy is bound to this inquiry. But the conceptualisation of power as reciprocal, as being reliant on resistance as its own legitimate power, points to an inadequacy of an analysis which simply asks who speaks with legitimacy? What must also be of importance, and which is the second point of inquiry that a Foucaultian analysis brings forth, revolves around this notion of silence. If silence is to be conceptualised, not as a repression, but as an act of power within itself, then the strategies of this silence must be analysed with as much legitimacy as the analysis of what is being said and how.

Foucault says “We are in a society of speaking sex” (1980a: 95). Indeed, since the Renaissance there has been a proliferation of sex chatter, but what a Foucaultian analysis brings forth is that the chatter we listen to, the chatter we hear as truth, is only one conversation. Indeed, only one part of a conversation. What we don’t hear is not what doesn’t exist, but what we discursively choose not to legitimate or to discount. The silence is not nothing, but rather, one strand of many which is both necessary for the conversation we hear, and a potential conversation in and of itself. There is then, an interdependent nature between silence and chatter, neither of which can exist to the exclusion of the other. If we return to the room described at the start of this section, we can observe the chatter and the silences working together to allow conversations to occur. There is a buzz from a macro perspective, because conversations are occurring

simultaneously. At the micro level however, there are individual, logical strands of conversation, which are reliant on both chatter and silence to exist.

Conversation however, like power and knowledge and discourse, is not static. Presumably, each person in this room, at the end of the day, will move on. And this movement will not be static either. Perhaps on the way home, they will drop off papers at the office, will pick up the children from school, and will stop off at the supermarket to buy milk. Perhaps tonight, they are going out with old friends and having a meal and a couple of drinks. What happens then, if the person from the room makes these movements, and carries with them, the conversations they have participated in during the day? Perhaps they re-tell an interesting point that was made during the conversation. Somebody else picks up on the comment and disagrees with the original interpretation. It reminds somebody else of another conversation they had been having on a similar topic, and so the conversation progresses. The conversation from the room, transmogrifies as it meets with other knowledges and other power relations. Foucault argues: "we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies" (1980a: 100). In essence, Foucault is advocating an understanding of discourse as fluid in nature.

Power/ knowledge meeting in discourse as described earlier, cannot then be conceptualised as being static or captured within discourse. Foucault argues:

Discourses are not once and for all subservient to power or raised up against it, any more than silences are. We must make the allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting place for an opposing strategy (1980a: 100-101)

If we are to accept this understanding, then the silence of the experiences and knowledges of women which second wave feminism has variously pointed to, cannot be entirely conceived as repression. Nor can the absence of lesbians in Australian legislation be read to equate solely with oppression. As Foucault has argued there needs to be a more complex understanding of these situations, imbued with the potential to resist, and freed from the constraints of dominant discursive knowledges. The following section is an exploration of this complex potential.

The simplicity of silence being oppressive then, although appealing in that it proposes its own solution, needs further complication. Speaking, in the image of a binary opposite, does not preclude the possibility that oppressive/ repressive acts can be felt as its result (Foucault, 1980a: 12). Indeed, speaking sex has specifically rendered repressive experiences for lesbians and (most stringently) gay men, particularly in legal discourse. Coming to terms with this complexity is a necessary pre-cursor to being able to articulate any analysis or theoretical possibility, which would move away from this situation. In order to examine this complexity, the effects and motives of both silence and speaking have to be understood. First I want to explore these effects and motives with relation to speech.

Foucault has argued that silence is not arbitrarily repressive and that silence may even be conceptualised as a point of resistance (1980a: 100-101). Foucault further claims that the presentation of silence as solely oppressive is a tactic that promotes the authority of a sovereign type power. As an act of governmentality this image of authority works to obscure the margin of liberty and to reinforce self regulating practices which maintain dominant ideologies (Hindess, 1996: 102). In a Foucaultian analysis, I would argue then, the experience of silence needs to be distinguished from the condition of silence. Feminist works have, for many years, dedicated themselves to the location of silences in legal,⁵⁴ literary (Daniels and Murnane, 1989; Clarke and Spender, 1992; Greer, 1995), and other theoretical pursuits. These silences are real and are experienced as such (Allen, 1986). The condition of silence however, is less arbitrary, and more contentious. It connotes both the condition with which women are allowed into, and the conditions within which women find themselves in, patriarchal discourses. However, it can also carry an understanding which is more simplistic and in no way negative- condition as a state of being- silence as a state of being. If we are to accept Foucault's notion that silence can be an act of resistance; that silence exists on a continuum of chatter rather than as its binary opposite; and that silences are not necessarily contained within any given discourse, then we begin to develop a productive representation of silence in the image of Foucault's description of power.

⁵⁴ See my earlier discussion of feminist jurisprudence.

Robin Patric Clair examines the paradox of silence and voice as forms of both oppression and resistance (1997: 6). She argues that the metaphors of silence as oppression and voice as resistance do not embody the reality of these constructions (1997: 11). Indeed, Clair explicates a notion of the self-contained opposite, "resistance/oppression", to explore this complex relationship (Clair, 1994; 1997; 1998; Verducci, 2000). In Clair's usage, both concepts of the self-contained opposite can be isolated in the effect of an act or utterance or silence, but what is most noteworthy is their simultaneous existence within the same moment (1998: xiii). The plurality of possibility associated with silence in Clair's work, can be seen to complement the Foucaultian notion of silence as a productive power. Its effects, the most striking of these being oppression and resistance, produce and traverse social relations, utterances and acts in a manner which is quite obviously akin to the ways in which Foucault characterises power. In essence, resistance and oppression, and the silence, which Clair situates as creating and perpetuating the same, are acts of power. In Clair's thesis, silence and voice co-exist and simultaneously effect, resistance and oppression. Silence/voice is, in essence, reciprocal power in play.

Evidence of silence being experienced in this double manner is found throughout a variety of second wave feminist theory. Silence is an effect, an experience of repression, and a potential site of freedom or resistance in the majority of this literature. The prevailing image of silencing as an act stems from patriarchal knowledges whether they be spoken about women or through women. The first signifies the process of construction of femininity as the lesser binary term to masculinity. Similarly, it represents the rendering of 'women's knowledges'- particularly those relating to bodies and sexuality, but also to histories and practices such as journal and letter writing- as irrelevant or non-truths. The image of silencing women through patriarchal speech is found in two distinct areas of literature- those concerned with the development of a 'feminine' language system to counter such knowledges (Code, 1991) and those characterising the effect of such knowledges as "gagging" (Irigaray, 1992: 51) or "lying" to women (Rich, 1993: 328). However, silence is also taken up by many feminists as a potential site of resistance. This notion is particularly found in writings dealing with race and sexuality. Evelyn Hammonds for example, describes the process of political silence as a strategy of agency: "Since silence about sexuality is being

produced by black women and black feminist theorists, that silence itself suggests that black women do have some degree of agency" (1997: 181). There are two notable characteristics of this double invocation of silence. In the first instance, there is the plurality itself, the irreconcilable but simultaneous effect of silence as repression and as agency. This counters traditional accounts of silence as repression only. In the second instance, there is the fracturing and transgressive nature of this plurality. Deirdre Lashgari describes the potential for this:

Heteroglossia, emerging from the specifics of social context, frees the monologue from its constricting knots. When a multiplicity of voices enters the discourse, when the margins talk back to the imperial or neo-colonial centre, the binary structure unravels (1995: 3).

Using linguistic references, Lashgari describes a situation where dominant voices are displaced by the multiple voices that make up the whole. The appearance of the binary situation silence or voice "unravels" when this micro level is given legitimacy. This resonates with Foucault's notion of binaries and the construction of sexuality intersects at this point and the value of conceptualising silence as multiplicity and resistance becomes apparent to this project in the image of transgression.

Although the plurality that exists in resistance/oppression is notably akin to Foucaultian notions of power, Clair's exploration is potentially limited in its scope within a notion of hegemonic discourse. As discussed earlier, Foucault's discourse is essentially fluid- boundaries blur and interact, and in Foucault's summation, no one discourse can be singled out as included or excluded. Clair's work conversely, relies on a notion of hegemony that is both spontaneously and coercively consented to by society (Clair, 1993). In reflection on this, Clair acknowledges Foucault's reciprocal and productive conceptualisation of power. She discusses the multiplicity of sites in which power can be located and concludes that hegemony has many inbuilt areas of conflict. With these sentiments in mind however, Clair is happy to employ the term as "still useful" (1998: 52). In employing the notion of hegemony however, Clair effectively contains the field of possibility within discourse, be it hegemonic or counter hegemonic. Caught in this bind, resistance stagnates in hegemonic discourse. If however, we are to return to the discussion of Foucault (at the start of this chapter), discourse is not best described in terms of static position and defined boundaries. Whilst discourse, in a Foucaultian sense, is a field containing possibilities, rather than one that exists to the

exclusion of other discourses, nor does it exist without reference to and influence from other discourses.

What I want to argue is that there is in fact a great flow between discourses and that dominant discourses are not the only place where resistance need occur, or power need be conceptualised. Power and resistance cannot be discussed as forces purely in relation to each other. A society, which speaks sex, creates knowledge. Dominant discourse, in a Foucaultian based analysis, is about the deference to these knowledges and the powers that produce these knowledges as truth claims.

Silence and Outlaw

There are two primary 'dialectics', as Grimshaw has labelled them (1993: 52), or conjunctions as I will discuss them, that emerge from the Foucaultian and feminist works on silence and which further the formulation of outlaw discourse. The first of these is the similar characteristic of plurality that silence assumes in these works. However, although I have characterised outlaw discourse as founded on plurality, I do not simply want to draw out this commonality. Rather, I want to draw on the specific politics contained in the feminist explorations of silence that inform the concept of silence in the lesbian outlaw. Feminist theorising of silence is situated against the dominant discourse of patriarchy.⁵⁵ It envisages silence as plural so that women's voices, feminist voices, may be heard. The purpose of this task is to give agency to silence and to develop an understanding of silence not as absence but as the potential for speech, or speech that is located in discourse other to the mainstream. The rupturing of binaries that Lashgari has argued above stems from this multiplicity of voice, otherwise characterised as silence in dominant discourse, and is indicative of the purpose I propose silence plays as a characteristic of outlaw discourse. This plurality is also particular because of its feminist lineage.⁵⁶ The charge of essentialism levelled at

⁵⁵ And other dominant discourses depending on the specific type of feminist theorising taking place- race, sexuality, capitalism etc. See earlier discussions of feminism above and in Chapter Two.

⁵⁶ Feminist writings have identified so many notions of plurality. I am thinking here, in particular, of the notions of 'woman' as plurality found in theories that reject patriarchal binary formations. For example Luce Irigaray argues that woman *is* multiplicity; "Woman would always remain multiple, but she would be protected from dispersion because the other is a part of her, and is autoerotically familiar to her" (Irigaray, 1981: 104).

many early feminist attempts at giving 'women' voice,⁵⁷ has rendered the task of multiplicity without hierarchy to feminist politics. This then, is a challenge I want to transfer to lesbian outlaw discourse when it interacts with legal discourse. The challenge is to take notions such as equality and to explore the potential for understandings outside of binaries, the space that is silence in multiplicity.

The second conjunction is also related to the plurality of silence and the specific of feminist politics. What I think feminist theorising does to the multiplicity of silence is to divide it between silence as a lived experience and silence as discursive potential.⁵⁸ Silence has dual recognition. Feminist imaginings of silence such as Clair's, above, allows an effect of silence to be repressive at the same time as being rudimentary to freedom. This freedom, being reliant on the idea above of agency in silence read here as discursive potential. The potential contained in the multiplicity of silence however, is not the key to any unbridled liberation by outlaw discourse as liberal democracy aims. Feminist politics constantly brings theorising back to the lived experience, where sexuality, gender, race, class, etc. have actual effect and can provide stumbling blocks to Foucault's notions of practices of freedom or liberation.⁵⁹ Consequently, this envisioning of silence, founded in experience and effect, is not solely repressive or problematic. Silence also has the potential for other imaginings, or for resistance, as Foucault would term it.

When we characterise these conjunctions of Foucaultian and feminist theories of silence, as strategies of the lesbian outlaw, I believe the task of taking contradiction seriously (outlined in the previous chapter) is facilitated. Conceptualising silence in these ways founds the lesbian outlaw in women's experiences and focuses on the agency of women whilst acknowledging the negative connotations that can also arise in situational silence. If articulating the effects of contradiction as legitimate experiences is key to taking it seriously, then this strategy fulfils the criteria. Not only does it help to

⁵⁷ This is the other type of multiplicity that I am thinking of- that found in charges laid by feminists on the grounds of race and sexuality. See for example: Lorde, 1984.

⁵⁸ Obviously, the language I am utilising here is Foucaultian and to some extent the task is also. Foucault has acknowledged the difference between experiences of repression and repression as a discursive imagining of power. However, the specific of silence as an experience is overtly explored in feminist works.

⁵⁹ This is not to say that discursive imaginings do not play actual roles in the lived experience, neither is it to say that they do not have effect, but it is to say that they will meet other discursive effects also.

articulate but in insisting on agency in such situations it also takes the power/knowledge relations that arise seriously. The emphasis is on articulating circumstances but also on exploring the effects, including resistant discourse and power. Further, in characterising silence as multiplicitous, outlaw strategies must similarly comprehend plurality and contradiction.

3.3 Truth

Truth and law

The previous sections have discussed “speaking sex” as a productive force, and have pointed to the privileging of legislative discourse as a site producing this chatter. Foucault situates law in “a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory” (1980a :144). What I want to turn to now, is the particular characteristic, which lends legitimacy to this site of sex chatter: the quest for truth. Liberal democratic theory uses ultimate concepts such as equality, rights and liberty, which promote singular interpretations (see Chapter One). These concepts are posed as legal truths. However, the contestability of these terms and the necessary conflicts that their interpretations ensures are clear. What this suggests is that truth is not stable and that it is discursively located. This section will explore this suggestion with relation to Foucault’s understanding of truth in plurality in order to critique liberal democracy.

If we are to read the law as discourse in the Foucaultian sense, then legal reforms such as the PRA do two things- institute particular effects such as enabling lesbians and gay men to access particular Acts of law and in a somewhat contradictory manner create particular knowledges such as the naming of homosexuality as deviant. (Chapter One). Knowledge and truth are closely related particularly in a dominant discourse such as law. Law is one discourse to which we commonly defer for ‘truth’ and as such, the particular knowledges that it creates have major significance. The contestability of these knowledges, and hence the destabilisation of singular truth such as law promotes, will be the focus of this section.

Foucault's work points to the "interplay of truth and sex" (1980a: 56-7), which, he argues, stems from the nineteenth century project of population management and the regulation of bodies (1980a: 56-7). More than this, Foucault discusses a "will to knowledge" (1980a: 73) and to truth related to sex and sexuality, within which sex chatter is caught. Sex, he argues, "had to be put into words" (1980a: 32) for it to be known, and hence for it to be caught in relations of power and governmentality.

In *The History of Sexuality Vol. 1*, Foucault argues the existence of an "incitement to discourse" (1980a: 17) that is, a proliferation of discourse and knowledge. He talks of "the multiplication of discourses surrounding sex in the field of exercise of power itself: an institutional incitement to speak about it, and to do so more and more" (1980a: 18). People defer to dominant discourses- religion, science, legal systems and other state apparatus to provide a sense of order and an understanding of their place in the world. Through these institutions we legitimate codes through which we can interpret the world. Foucault says of this: "Each society has its regime of truth, its "general politics" of truth: that is, the types of discourse which it accepts and makes function as true..." (1980a: 73). Through these discourses, we order and we name- right and wrong, fact and fiction, equality, justice, liberty and democracy. The tension between the need to resolve and the impossibility of resolution however, mars this system. The contestability of what is right and what is wrong, the blurring of boundaries between fact and fiction, the subjective interpretation of equality, justice, liberty and democracy characterise the non-utopian reality of the world, whether we choose to label it post-modern or not. And yet humans in this space need to know themselves with certainty does not diminish. People do not move between chaotic moment to chaotic moment without telling stories that attempt to order and make sense of the world and our position in it. And so everyone is left or perhaps are found, in this state of perpetual negotiation, where truth is continually under siege, and simultaneously continually being propped up and supported. People cannot let go of all that they know as certainty or narratives have no logic. In the same moment however, people cannot trust a certainty that they know is misfitting and uncomfortable because it is comprised of a plurality of incomplete truths. People barter for a stake in the negotiations, bid for part of the truth. They name themselves and others without the necessity of reference or

connection to what is heard. And all the while people are the sellers, they are simultaneously the buyers in need of a new truth and order.

Given this state of flux and the irreconcilable nature of truth, Foucault suggests that the point at which we need to analyse society is not found in truths themselves, but in the processes that lead us to this point (1980a: 75). The market place of truth, where we barter and bid, is more telling in a Foucaultian analysis than the product that is being purchased. Foucault advocates an analysis of the negotiations surrounding truth. Who speaks, who is spoken to, what is said and to what end. If we understand truth as a melded concept, the result of a need to order and understand ourselves, then we can agree with Foucault's site of analysis. Inquiries into truth, if we are to accept the nature as Foucault describes it, shift in focus somewhat from more traditional approaches. We do not need to unmask some hidden truth or put ourselves on a journey to seek enlightenment- we need instead to unravel the processes behind the production of truth.

In his later work at the College de France, Foucault developed a theoretical focus on truth. He summarised it thus:

I have tried to discover how the human subject entered into games of truth, whether they be games of truth which take on the form of science or which refer to a scientific model, or games of truth like those that can be found in institutions or practices of control (1991a: 1).

What Foucault is describing is a conceptualisation of truth that contradicts common usage of the word- of particular concern here, an understanding that contradicts the assumptions of truth pervasive in liberal democratic, legalistic discourse. Foucault proposes a model of truth where the ultimate, conclusive, provable characteristics of its common usage are displaced by a sense of multiplicity and strategy (*games of truth*). He argues regimes of truth hold in each society (1991a: 73). There are trump cards of truth telling, discursive legitimacy that circulates within social systems- legislation, medicine, psychiatry etc. in the majority of Western societies. However, this legitimacy does not exclude the potential of truth in plurality. Indeed, the possibility of truth in plurality keeps the process of strategising and the politics of truth in circulation.

Truth also belongs to discourse and as such, assumes its characteristics of fluidity and multiplicity. The first project of the history of sexuality is an analysis of discursive

legitimacy: who speaks, who is spoken to, what prompts people to speak and what is said (Foucault, 1980a: 11). This analysis is importantly concerned with the production of knowledge. Foucault argues that knowledge and power come together in discourse (1980a: 100). Knowledge is about what is said when sexuality is spoken, but also about the conditions which allow it to be said, the processes and discourses which legitimate it. To this end, Foucault's work traces the discursive history of sexuality and analyses the deference of society to certain discourses, in search of the 'truth' about sexuality. What Foucault contends, is that no ultimate truth about sexuality does, or can, exist. What interests him, are the ways in which Western Society invests itself in dominant discourses-medicine, psychiatry, the government, and the institutions they create and regulate- in search of the legitimate 'true' talk regarding sexuality (Foucault, 1980a: 30-31; Sawicki, 1991: 39). His interest lies in the process of this deference and the search for truth, but also in the simultaneous presentation of these discourses as authoritative knowledges possessing that very truth (Foucault, 1980a: 30-31; Martin, 1996: 190). But the sovereign figure of power is the figure against which Foucault writes, and while the search for truth, held in this manner, is perpetuated, the attention is diverted away from these legitimising processes and the construction of sexuality. And so the issue of discursive legitimacy raises a second interesting point. What becomes apparent is that although certain discourses are invested with social legitimacy and claim their chatter of sex as truth, equally, other conversations, other chatter, exist simultaneously.

Because of this, Foucault argues, truth also possesses particular affinities with other major discursive formations- power/ knowledge and sexuality for example. Truth is carried through power/ knowledge and within discourse. Indeed, these affinities are more likely characterised as interconnections since each is in some way interdependent on the next. Within discourse power and knowledge meet and through power/ knowledge we produce 'truths' regarding sexuality (Foucault, 1980a: 56). It is in part through our deferment to the legislative system that we know homosexuality, and as Foucault would argue, that we situate our primary "will to truth" (Foucault, 1981: 54) about homosexuality. We can see however, two specific indicators that an ultimate 'truth' about (homo)sexuality does not exist despite the legal impulse towards such a presentation. There is the changing nature of homosexuality in law constructed through both penalty and enablement which points to shifts of power/ knowledge in the construction of a legal truth.

We know, through the legal system, what homosexuality looks like (sodomy and buggery laws), how it behaves (in a manner needing to be monitored and contained), for whom it is acceptable, for whom it is unacceptable. Often times we know it in a contradictory manner, and should we cross state borders, or from state to federal legislative codes, we know it differently. But for all its contradictions, alternative formations and boundaries, we know homosexuality intimately, through the legal framework in Australia. This certainty does not negate the fact that we also know homosexuality through other means. Homosexuality is experienced through bodies and through the observation of others. We can trace histories of homosexual communities, women living on the land, gay ghettos or other geographical configurations. We know homosexuality through political agitation, liberationist publications, feminist activities, gay and lesbian lobbies both locally and internationally. We watch gay characters on sit-coms, straight women's 'lesbian' kisses in glossy magazines, protracted coming out stories in television dramas, and the occasional gay movie come Mardi Gras time. But for all this, there is still a pervasive legality, which transcends these knowledges. Bodily knowledge is restricted in law by age and location; geographical clusters of lesbians and gay men are often over-policed; political activities are surveyed; and lesbian and gay publications and productions, are censored for sexual connotation. The legal knowledge of homosexuality is both pervasive then, and specific as a type of knowledge.

The constructed co-existence of lesbians and gay men with the current legal code in Australia, dates from colonial times. Male homosexuality, through sodomy legislation, was a crime punishable by death. Walter J. Fogarty (1992) and Joseph Chetcuti (1994) trace a stringent policing and persecution of male homosexual acts in NSW, prior to the introduction of sodomy and buggery laws in 1883. Indeed, Fogarty notes that an attempt to pass similar legislation had been made some twenty-one years prior to its final enactment (1992: 65). From the outset of our current legislative system then, (male) homosexuality has been rendered a legal problem. So too, has lesbianism been problematised in the Australian legislative system. Although never illegal, lesbianism has been policed (Joyce, 1998; Johnston and Van Reyk, 2001), censored, regulated, and cited as a disqualifying characteristic in legal discussions, particularly child custody cases where a mother has openly identified as lesbian (Bateman, 1992). Homosexuality is a distinct legal category, which has taken many guises since its initial construction.

Age of consent legislation, anti-discrimination laws, relationship recognition acts have all marked homosexuality as a specific legal category. Similarly, legislation which specifies heterosexual relationships, such as marriage and de-facto legislation, have signified the legal boundaries at which homosexuality is held at bay. Law constructs homosexuality as deviant and as Foucault has argued, maintains this as 'truth' through its status as dominant discourse.

Truth and Feminism

The majority of second wave feminist theory connects in some manner to truth be it in a direct or indirect manner. This section will focus on two primary uses of truth in feminist theory. The first is the process of truth telling through the formation of women's narratives. Kathleen Kennedy claims that lesbian feminist theorising has a particular affinity with the notion of truth, based on the practices of life-narratives, consciousness raising and coming out stories which inform and prompt them (2000: 151-2). Each of these practices emerged, at least in part, in reaction to patriarchal and heterosexist knowledges, and are thus well situated as transgressive discursive acts in a game of truth. Kennedy argues that a Foucaultian framework of discourse analysis leads to the conclusion that "truth legitimises and constructs a particular subject position" (2000: 155). As such, feminists have used narratives to formulate 'other' truths, narratives that privilege women's experiences and expressions against what is conceptualised as patriarchal truths regarding women. This is intricately linked to the role of silence in feminist theory discussed in the previous section and points to the creative potential of truth and silence when conceptualised as multiplicitous.

The second use of truth in feminist theory that I want to explore is the insistence on multiplicity when conceptualising truth through the practice of self-empowerment.

Adrienne Rich says of truth:

There is no 'the truth', 'a truth' - truth is not one thing, or even a system. It is an increasing complexity. The pattern of the carpet is a surface. When we look closely, or when we become weavers, we learn of the truly multiple threads unseen in the overall pattern, the knots on the underside of the carpet (1993: 329-30).

This feminist engagement with truth clearly resounds with Foucault's work. Truth in this invocation, is multiplicitous, however the plurality is masked by a façade, and

revealed only through purposeful inquiry. I think this imperative towards looking closely at truth, is the prompt for the majority of feminist inquiries.

Foucault argues in his final works that the inquiry into the truth teller is of primary importance in dealing with truth (Foucault, 2001: 14-15). In as much as feminist works locate and deconstruct patriarchy as a truth system, this is also true of feminist engagements with truth. However, there is a firmer feminist focus in engagements with the truth and with truth telling on agency and empowerment than with the sole task of questioning the truth telling process. Foucault's enquiry into the truth is primarily analytical. He examines "the "problematization of truth" in Greek philosophy, the acute defining and explaining process of truth telling that he claims pre-occupied such writings. In doing so he prompts inquiry into the practice of truth-telling in a manner which clarifies his purpose for earlier inquiries into madness and sexuality: "who is able to tell the truth, about what, with what consequences, and with what relation to power" (2001: 170).

Feminist engagements with truth tend to follow the same line of questioning however their aim in doing so is more pragmatic, stemming from a more immediate political setting in the women's movement. The rendering of truth as multiplicitous and the deconstruction of patriarchy as a dominant truth telling system, is the background for the more overtly political act of articulating women's 'other' knowledges. If truth is plural then, as Lashgari has argued of the multiplicity of voice, the logic of binaries such as sane/ mad, rational/ irrational, public/ private, designed to keep women in the unknowing, untruth dichotomy, are indeed unravelled. The process of empowerment that women's movements agitate for, lie in this instance in calling women to legitimate their own knowledges and practices, in situating what they know as truth despite the prevailing dominance of patriarchal truths. The insistence, to follow Rich's imagery, is to become the actual weavers, to be in charge of deciding patterns, colours etc., not just to note the knots on the underside of the carpet.

The significance of this distinction for this particular project lies in the practice of feminist politics, the encouragement towards agency and the particular standpoint that it urges. This thesis will use Foucault's notion of truth because of its clear explication and because its use is obviously beneficial in the critique of liberal democracy. It will

however, simultaneously develop a feminist standpoint through outlaw discourse to ground this critique within an overall framework of feminist politics. Despite the various frictions that have been articulated by many theorists, the correlations between feminist and Foucaultian explorations of truth emphasise the appropriateness of this coupling. So too do Foucault's own comments on the purpose of re-conceiving truth towards practices of freedom. In an interview in 1984, he explicitly linked his exploration of truth with practices of freedom, and projects of liberatory practice (Foucault, 1984: 67-75). He argued that his focus on the self (found in his early discussions of power and later in his works on ethics) extended to his exploration of truth and that the purpose of this was to encourage people towards self awareness, and in turn encourage them again towards instituting practices of freedom, or greater self determination (Bernauer and Rasmussen, 1991: 2-3). This is also, arguably, the task set via women's movements which second wave feminists have taken up in their explorations of truth. The potential of this Foucaultian/ feminist imperative towards practices of freedom will be further explored through a discussion of outlaw truths below.

Truth and Outlaw

In the previous section I argued that silence as a strategy allows the lesbian outlaw to take contradiction seriously. Through truth as a similar strategy, the particular deviant and sexed characteristics of the PRA are also able to be considered, which is the second challenge offered of the lesbian outlaw in the previous chapter. Foucault characterises human interaction as a series of "games of truth" (1991: 1), that is, discursive practices of power which seek to legitimise certain knowledges in a bid to govern. Foucault's contention is that privileged discourses make claim to legitimate truths. Knowledges located elsewhere, however, are concurrently generated and circulated throughout society, leaving a situation of play between knowledges- a game of and for truth. Within this context lesbian outlaw strategies emerge. The lesbian outlaw is characterised by the articulation of other imaginings as discussed in the previous section on silence. This means that the lesbian outlaw articulates knowledges that lie beyond mainstream dominant truths. Foucault says of this potential:

We escaped then a domination of truth, not by playing a game that was a complete stranger to the game of truth, but in playing it otherwise or in playing another game, another set, other trumps in the game of truth. I think it is the same things in the order of

politics, where we could criticise politics...but we could only do this by playing a certain game of truth, showing what were the effects, showing that there were other rational possibilities, teaching people what they ignore about their own situation... (1991:15 emphasis added)

I perceive the lesbian outlaw as an 'other rational possibility' to legal knowledge. Not as counter to and not as external to law, but as other to legal rationality- connected but transgressive. The lesbian outlaw articulates knowledges that challenge legal truths- knowledges where, for example, lesbian relationships are whole and real, where love does not equate solely with property, where emotions are not necessarily rational, and the impetus to relate is not necessarily understood. This stems from the basis of the lesbian outlaw in experience (discussed previously and evidenced further in Chapters Seven and Eight). As a discourse, the lesbian outlaw plays a game of truth where knowledge is articulated through the body, emotions and sex of lesbians as opposed to legal truths, which articulate, as illustrated in the PRA, through notions of neutrality and governmentality, informed by heterosexist frameworks. This is the primary strategy of the lesbian outlaw- to transgress law with outlaw truths.

Foucault's "will to truth" is also directive in conceptualising lesbian outlaw strategies. In acknowledging the will to truth of laws and legal systems the lesbian outlaw submits a challenge to ultimate states of 'truth' and opens the passage for the articulation and the legitimisation of other truths. As discussed above Foucault describes the desire for singular, ultimate clarity that prompts the will to truth. Discourse that cannot be assimilated into a truth, is rendered deviant, or silenced so as to maintain the appearance of ultimate authority. At any moment in Australian history, lesbians and gay men have been variously assimilated, rendered deviant, or silenced in law. But the truth of such laws maintain stronghold only when privileged. Although it cannot be said that anyone lives external to the law in a democracy such as Australia, the privilege of legal discourse does not wholly infiltrate the daily lives of citizens. In the example of lesbians and gay men we find overt evidence of this, and impetus towards the legitimacy of the lesbian outlaw. In the every day lives of lesbians and gay men, in relationships, family ties, love, sex and understandings that are created, there is a defiance against a hetero-patriarchal legalist knowledge incapable of or unwilling to imagine these things. But further than defiance, there is the creation of another truth- the lives of lesbians and gay men form discursive knowledges that the lesbian outlaw is able to articulate and link (although not exclusively) to legislative discourse.

The legitimacy of the lesbian outlaw is also brought back to the notion of assimilation found in Foucault's will to truth. Ruthann Robson's argument that the law domesticates the lives of lesbians is a very similar concept to Foucault's notion of assimilation. Robson argues that lesbian survival is threatened when a legal system forces frames of reference onto lesbians and lesbian relationships, which are essentially heterosexist. She says: "The law defines our lesbianism for us, when it promises us protection and acceptance if we can argue ourselves into its categories" (1992: 11-12). Robson advocates the development of a lesbian legal theory where legalisms run second to the needs of lesbians. She argues: "We must avoid the tendency to thinking the dominant legal terms so that our lesbianism becomes colonised, watered down, and domesticated by legal thinking" (1992: 12). The lesbian outlaw is discourse capable of this because it is other-to-law and as such, claims other knowledges. Robson does not advocate an out of law negotiation of lesbian, rather to make the law "responsive" to the needs of lesbians (1992: 17). Her theorising challenges the law by asking lesbian centred questions of it, arguably, a task the lesbian outlaw can assume.

What I want to advocate of the lesbian outlaw, is an articulation of truth in order to create a specific discourse from which to analyse legal systems and processes. The lesbian outlaw is marked by an ambiguous straddling of in law and out of law practices and perspectives. In privileging lesbian outlaw narratives, embracing contradiction and legitimising lesbian experiences, the lesbian outlaw articulates other truths that engage with, but are not constrained within, law. Outlaw discourse is one where law is displaced as the central concern, and from which the law can be interrogated and confronted by an extra-legal imagination. The lesbian outlaw articulates a truth that does not counter legal truths such as the PRA, but which represents rather, the silences it strategically renders either unspeakable or void.

Helene Cixous argues the implications of such a discursive shift, which privileges feminist political strategies. She argues that "all the stories would have to be told differently, the future would be incalculable, the historic forces would, will, change hands, bodies; another thinking as yet not thinkable will transform the functioning of all society" (1975: 93). In 1975 it was Cixous' contention that "it is time to transform. To invent the other history" (1975: 96). Changes to the social recognition of women,

economic, legal and sexual freedoms that have developed through the pursuits of feminist ideologies in public policy and personal awareness have certainly proliferated across the Western world since Cixous wrote her words. However, I would contend that this 'other history' is a project that is as yet, incomplete. Given Foucault's constant history of the present, perhaps this is necessarily so. Regardless, Cixous's words articulate the space in which lesbian outlaw discourse is found, the retelling of feminist histories, feminist knowledges, feminist truths. This is a project that necessarily interacts with legal discourse, but which runs other to it simultaneously, creating and articulating truths which privilege feminist political measures.

3.4 Conclusion

In earlier chapters I have characterised the lesbian outlaw as resistant discourse and subject position. What I have argued throughout this section is the specific nature of this resistance and the strategies that formulate within it. Since power and knowledge are met within discourse, what I have described is both individually and also the nexus of the two. In Foucaultian thought this is necessarily the case since neither term makes sense in and of itself. In the previous chapter I discussed the characteristics that I believe mark the lesbian outlaw's utility in a legal inquiry such as the one I am conducting on the PRA throughout the thesis. This chapter has outlined the specific of knowledge that accompanies and amplifies this utility of the lesbian outlaw.

There is a particular limitation to the lesbian outlaw as described in the previous chapter and that is its generic theoretical nature. There is no given theoretical purpose for outlaw discourse, no theoretical alliances based upon which it could act. If we conceptualise this discourse however, in a Foucaultian sense, then this is an obvious deficiency since discourse, power and knowledge are inextricably tied together. Outlaw discourse, by this definition, must have specific knowledge. My use of lesbian outlaw discourse and subject position requires this specific to fulfil its function outlined above. I set out to explore the ways in which I intend to develop the notion of outlaw discourse throughout the thesis to give it a specific focus and intent. Granted, to some degree, outlaw discourse is directed in this manner when given a subject. The PRA and more specifically, the experiences of lesbians under the Act give outlaw discourse focus,

however, the element of theoretical explanation and exploration still remains generic without the above discussion.

A lesbian outlaw strategy is a conceptual and theoretical prompt and act. I have characterised two primary strategies- those of truth and silence- that I will make use of in the following chapters of analysis. I have argued that Foucaultian and feminist theories have been useful in articulating these strategies as plural and contradictory. Most importantly, they are useful in conjunction because they direct strategies towards taking contradiction seriously and giving consideration to the sexed and deviant nature of homosexuality in the PRA, which were the challenges formed of the lesbian outlaw in the previous chapter. Throughout the remainder of the thesis, these strategies will be further enhanced by theoretical considerations, particularly Foucaultian ones, and through usage within actual analysis.

We start to see the lesbian outlaw when the critique of governmentality is put to liberal democracy. The constant motion inwards- gathering subjects towards equality, justice, freedom and the like is seen otherwise. The project becomes recognised for what, and who, it excludes as importantly as those it includes. This notion of in and out is the basis of the lesbian outlaw. When we take the example of the PRA, recognising these in and out categories becomes a contradictory process because of their incomplete nature. This is in opposition to a liberal democratic reading where the situation is more likely explained as this processing inwards towards these ideal states. Again, I have characterised this in/ out nexus of contradiction as marking the lesbian outlaw. In the previous chapter I argued that this contradictory discursive space has been recognised for its transgressive potential in studies of the outlaw. In summary of these explorations, I argued that this potential, or utility, is marked by four distinct characteristics: contradiction, plurality, justice and, in the particular case of the lesbian outlaw, lesbian sexuality- both of the lived body and as a political base. Foucault's notion of the plurality of discourse allows us to invoke the lesbian outlaw in a reading of the PRA. Through understanding the potential for discursive interplay the PRA can be read within differing discursive rationalities- in the case of the thesis, those of liberal democracy and the lesbian outlaw.

The *identification* of discourse however, is not so much the Foucaultian project as is recognising the interplay between power and knowledge that prompt, produce and validate any given discourse. Within discourse truths are formulated- knowledge statements that lead to governable practices (Foucault, 1984: 64). In identifying the lesbian outlaw as resistant discourse to liberal democracy, these truths, or more precisely, knowledge claims, take on particular importance. There is, in a sense, a need to know what the lesbian outlaw offers both against liberal democracy and as its resistant alternative. The exploration of this particular knowledge will be conducted in application throughout the thesis. However, Foucault was as much interested in the process of legitimation and application as in understanding what was said. As Garland argues, Foucault sought to understand the "complex preconditions that make statements sayable" (1999: 19). This then, has been the undertaking of this chapter, to explore and to articulate the particular play of power/ knowledge that prompts the lesbian outlaw into being and makes the knowledge sayable within the discourse.

This returns us to the quandary of legal description found in Duberman's piece at the outset of this section. Duberman argues a need to think of "differentness" in a legalistic manner that does not make an automatic association with deviance. The trouble that he locates however, is a deficiency of liberal democratic discourse to accommodate such a necessary rupture of binary thought. What I will argue throughout the remainder of the thesis is that the lesbian outlaw accommodates this need. More pertinently I will argue that it can do so because of these two specific preconditions of knowledge that contradict the rationality of liberal democratic discourse as explored in this chapter: truth in multiplicity and silence as vocality. What follows these chapters of theoretical exploration, is a discursive analysis of the PRA using, and developing, an understanding of the power/ knowledge nexus found in the lesbian outlaw.

Chapter Four

Deviant Truths:

An analysis of the *Property (Relationships) Act 1984 (NSW)*⁶⁰

The principle of identity and its correlates, the principle of difference and the principle of equality, remain in the stilled sky of the Platonic ideal. The logocentrism of Western logic, legislated by men, institutes an order that pretends to govern a world it does not see, hear, or touch (Jeffner Allen, 1986: 91)

4.1 Introduction

The remaining chapters are an application and development of the lesbian outlaw framework from the previous chapters. The following three chapters specifically examine the negotiation processes that resulted in the production of the *Property (Relationships) Act 1984 (NSW)*, a new legal 'truth' in the NSW legislative system. This negotiation process of the PRA consists of the text of the Act itself, the parliamentary history and debate and media interpretations. Ultimately, these three chapters will argue that using by a lesbian outlaw framework, the PRA can be read as an act of governmentality that promotes the deviant status of homosexuality whilst simultaneously enabling lesbians and gay men through the NSW legislative system. The role of liberal democracy, particularly the role of silence within this discourse, in producing the PRA in this way is also examined.

This chapter analyses the PRA in detail by examining the historical position of the PRA, as a deliberate thwarting of the intentions towards equality for same sex relationships outlined by the NSW Gay and Lesbian Rights Lobby (GLRL) through a parliamentary discourse that is heterosexist. This filtering discourse of the NSW parliament is bound to the insufficiencies of liberal democratic rationalities explored in the previous chapters, and in-law (established, heterosexist) alternatives and imaginings. As such, the PRA is considered similarly bound. To support this claim, the chapter also

⁶⁰ This chapter draws on my paper of a similar name, given at the 8th Interdisciplinary Gender Studies Conference, University of Newcastle (NSW), 29 June 2001: "Deviant Rights: An analysis of the *Property (Relationships) Act 1984 (NSW)*. Sections of this chapter also draw on Cahill, Erin. (2000) "Defining the Legislative Self: An analysis of the *Property (Relationships) Act 1984*" Honours thesis, Department of Gender Studies, The University of Sydney.

looks at two (unpassed) bills considered to be parliamentary predecessors of the PRA. These bills attempted to legally redefine (re-imagine) relationships whilst producing legal recognition for the relationships of lesbians and gay men. These are characterised as belonging to lesbian outlaw discourse. The PRA, comparatively, extended a pre-existing (heterosexual and, as I will argue, heterosexist) definition of relationship to some same sex couples in a limited number of situations. The chapter then breaks down the PRA and analyses, in detail, the production of a deviant figure in law and discusses the practical limitations of the legislation and the contradictions that are established in the process- at a personal, state and national level.

Theoretically, the chapter argues and concludes that the in-law imagining of relationship types found in the PRA does not establish the conditions of equality or the fulfilment of rights, which are purported under liberal democratic discourse (explored further in proceeding Chapters Five and Six). This is because the project of governmentality ensures that such imaginings are not realised so that legislative discourse can maintain its heterosexist equilibrium. Through a process of governmentality the PRA wrote a 'new truth' into legislation when it recognised lesbian and gay relationships for the first time, but that this truth did not destabilise the historical and legal positioning of homosexuality as deviant. In doing so, questions are raised regarding the notion of 'truth' held by legal liberal democratic rationalities.

4.2 Methodology

This chapter analyses a variety of primary documents- the initial lobby documents in NSW that argued for the recognition of lesbian and gay relationships, three bills and two Acts of NSW parliament that attempted to accomplish this recognition, and two government review documents of the PRA that marked the introduction of this recognition in NSW. Emma Ogilvie has argued that feminist legal theory requires a multiplicitous methodological approach (1996: 1). She argues that legal issues involving women and gender have suffered because of narrow research and sourcing that have informed legal decisions and changes (1996: 6). This singular approach⁶¹ appears to represent the more 'mainstream' legal approaches that the bulk of recent

⁶¹ Ogilvie focuses on the use of 'official' statistics that do not adequately represent the experiences of women. One could however, find many other examples that are particularly relevant to lesbian and gay men such as stereotypes, medical or psychiatric opinion, etc.

critical legal theorists have brought into question, disputing the accuracy of 'objective' and 'reasoned' legal theory and practice that more often reflects patriarchal, imperialist and other biased 'truths'. In response to such claims, this chapter argues using a more multiplicitous outlaw approach to studying law and law reform, in both perspective and method. It meets the outlaw challenge of multiplicity by using a variety of documents for analysis, and employing a multi-disciplinary approach to the law reform process—one of which is historical and sociological as well as legal.

The documents analysed are: *The Bride Wore Pink: Legal Recognition of Our Relationships* (1993 and 1994); the PRA itself; the "Significant Personal Relationships Bill 1997" (SPRB); the "De Facto Relationships Amendment Bill 1998" (DRAB); *Discussion Paper 44: Review of the Property (Relationships) Act 1984 (NSW)* published in April 2002⁶² and *Domestic Relationships: Issues For Reform. Inquiry into De Facto Relationships Legislation*.⁶³ What is particularly useful about the latter two documents is their multi-vocality. Each document enlists a variety of responses to the legislation from both organisations and individuals. Studying these documents then, and the respective responses, represents a much broader field of inquiry than initially suggestive of the documents themselves. The nature of these documents however, deserves consideration and appropriate caution. Each document is collated by a government agency, however submissions to the two committees were open to anyone. The responses represent both individuals and organisations. The organisations that responded ranged from groups with political interests, religious groups and legal organisations. The individual submissions represented a similar type of interest range, although also featured a high number of submissions from individuals and couples (mostly lesbian and gay) who would be affected by the legislation. These submissions are highly subjective in the majority of instances and retell individual stories and situations (this type of individual experience of the PRA will be considered in greater

⁶² This document was authored by the NSW Law Reform Commission, at the request of the NSW Attorney General in 1999. It called for public submissions on a range of issues that were raised about the PRA and elicited 24 responses that are held by the Commission in Sydney.

⁶³ This document was authored by the NSW Legislative Council Standing Committee on Social Issues. The Committee was issued with a referral to inquire into de facto relationship legislation in 1998 after the introduction of the "De Facto Relationships Amendment Bill 1998" to NSW parliament. The document considers 138 submissions received prior to the passage of the PRA and a further 16 supplementary submissions in response to the passage of the PRA which occurred during the period of consultation. Because of the co-incidence of the inquiry and the passage of the PRA, the resulting document focuses heavily on the scope and style of this legislation.

detail in Chapters Seven and Eight). As such, this analysis will focus primarily on those responses elicited by government organisations and non-government organisations without political or religious affiliations. Although I do not hold that these are objective documents they do represent coalition voices for many individual stories. This chapter will rely on the comments and recommendations of the authoring committees to account for the other individual responses.

4.3 Deviant Truths

This section compares the PRA as it passed through NSW parliament, to its previous incarnations in the lead up to its passage. The two areas I will focus on are a document published by the NSW Gay and Lesbian Rights Lobby (GLRL) entitled *The Bride Wore Pink* (TBWP) and two unsuccessful relationships bills predating the PRA: The “Significant Personal Relationships Bill 1997” (SPRB) and the “De Facto Relationships Amendment Bill 1998” (DRAB). Juxtaposing these two analyses highlights the process of governmentality of which the PRA is a part. It contrasts the potential truths (forms of legally recognised relationships) that the parliament rejected, with the actual truth that the PRA supports. In doing so, it contrasts ‘outlaw’ visions with the ‘inlaw’, liberal democratic, heterosexist truth of the PRA. Such a polarity aides in understanding the process of governmentality because the margin of liberty becomes apparent in such a contrast and the workings of governmentality (the production and control of ‘truth’) that protects it are also brought to the fore.

I have previously discussed how sexuality has been regulated through norm and deviant categories. It is useful here however to reflect in greater detail on how relationships in particular have become the focus of governmentality. This is aptly done by examining Rose’s idea of governable spaces- his description of how particular things become sites of governmentality. Rose develops three stages of formulating governable spaces, which can be traced through the production of the PRA: territorialising, spatialising and modeling (1999: 34-37). Briefly explained here, territorialising is the process of problematising something and then delineating the space to be governed (1999: 34-6). Spatialising is a process of making the governable space visible and the act of representing the space in general (1999: 36-7). Modeling then, is the process of imagining the space as it is desired in a governed state and the implementation of

particular configurations in that space to facilitate the governing process (1999: 37-8).

In an earlier paper with Peter Miller, they explain:

Governing a sphere requires that it can be represented, depicted in a way which both grasps its truth and re-presents it in a form in which it can enter the sphere of conscious political calculation... (1992: 182)

In terms of the PRA, this process is an historical one spanning many years. Same sex relationships have been problematised through a variety of discourses: political legislative, medical, scientific as well as public discourses in the forms of debates, discussions, media and so the list continues. Chapters Four-Six of this thesis explore the remaining two processes in detail through examinations of the Act itself, and the processes which produced and interpreted it- parliamentary discussions and media responses. What is important to note here is that according to Rose's three stages, the PRA appears firmly to be an act of governmentality. Governmentality creates a truth about same sex relationships that essentially does not contradict or accordingly destabilise the norm and deviant categories that it relies on. The PRA brings select same sex relationships into this model, through this new legal truth, and correspondingly perverts and protects the margin of liberty. 'Other' knowledges of relationships, such as those posed by the unsuccessful bills, are not legitimised. The margin of liberty lies overtly behind the image of heterosexual relationships, where marriage is the ideal model.

The Bride Wore Pink

In NSW the initial concerted consideration of laws that would recognise the relationships of lesbians and gay men came in 1993 with the publication of a discussion paper *The Bride Wore Pink: Legal Recognition of Our Relationships* (Katzen and Shaw for the Lesbian and Gay Legal Rights Service). The Lesbian and Gay Legal Rights Service, a project of the GLRL, produced the First Edition of this document in response to a series of public consultations within the Sydney area. It argued the importance of legal recognition for the relationships of lesbians and gay men, stating: "The law around relationships is the linchpin of prejudice against us. The right to choose with whom we relate is a fundamental individual right" (Katzen and Shaw, 1993: 69). The document proceeded to outline key areas of legal discrimination faced by lesbian and gay couples and possible paths for legislative reform in NSW. Community consultation again followed the initial publication of TBWP and a Second Edition was published in 1994.

The initial recommendations contained in the First Edition of TBWP differed quite significantly from those contained in the second. The first recommended a registered relationships model of legal recognition, and the second recommended the de facto model of relationship recognition found in the PRA.

The relationship registration⁶⁴ model of recognition proposed in the First Edition of TBWP⁶⁵ followed in the footsteps of Denmark's successful system put into place in 1989.⁶⁶ This type of legislative reform required the introduction of a new piece of legislation specific to the relationships of lesbians and gay men. The benefits cited of such a specific legislation were largely focused on the flexibility of the system. The system would require an opting in of parties to register their relationship- there would be no mandatory impositions. Specific to the relationships of lesbians and gay men, the system would be mindful of such relationships rather than conferring a heterosexual model where it may be irrelevant. Conscious of the various societal influences, including homophobia, which prevent same sex couples from cohabiting, the system's flexibility would extend to recognising a registered but non-cohabiting couple. Essentially, the same rights and responsibilities that are accorded to married or de facto heterosexual couples would be extended to registered same sex couples, without the imposition of a heterosexually originated definition of relationship. Following this

⁶⁴ Interestingly, the South Sydney Council introduced a relationship register in 2003. By 2004 this had been extended to the general Sydney Council's jurisdiction. This register does not confer legal rights or obligations. It is symbolic more than anything. A certificate of registration may be useful evidence in a court case where two people need to prove their de facto status under the PRA however this has not yet been tested. To date a total of only seven couples have taken the opportunity to register their relationships in this way.

⁶⁵ The 1st edition of TBWP made the following recommendations:

The Lesbian and Gay Legal Rights, a project of the Gay and Lesbian Rights Lobby recommends that:

- The NSW Government introduce registered partnership legislation for lesbians and gays;
- The NSW Government and the Federal Government change particular legislation to include our significant personal relationships;
- The NSW government and the Federal Government change the Anti-Discrimination Act (1977) to include lesbian and gay relationships under the definition of "marital status";
- The Federal Government change existing anti-discrimination legislation to extend protection to lesbians and gays in all areas on the grounds of sexual orientation and marital status;
- The NSW State Government and Federal Government provide adequate services to facilitate the implementation of effective reform which responds to the needs of different groups within our community.

⁶⁶ A relationships register was introduced in Australia through the South Sydney City Council in 2003/4. However this register is not legally binding. Tasmania's state legislation (*Relationships Act 2003 (Tas)*) however established a register in 2004 which accords recognition and obligations to significant personal relationships including those between people of the same sex. (<http://www.justice.tas.gov.au/bdm/relationshipinfo.htm>). Relationship registers can now also be found in other parts of Europe and America.

model of recognition recommended in the First Edition of TBWP the "Significant Personal Relationships Bill 1997" was introduced to NSW by member for Bligh, Clover Moore in September 1997. It proposed a system of registered partnerships, aside from both marriage and established de facto provisions. Moore intended the registered partnerships provisions to include couples of the opposite or the same sex, those who cohabitate and those who do not as well as people in non-sexual but committed relationships (Moore, NSWLA 25/09/97). The bill, although read in parliament, lapsed without vote.

The recommendations contained in TBWP were, however, revised before this legislative defeat occurred. There were two key justifications given for this redraft and the ensuing alteration in proposed recognition model. The first of these was as the result of feedback from lesbian and gay communities. Hayley Katzen,⁶⁷ one of the authors of TBWP, argued that the First Edition was not only an advocate for relationship recognition in law but also a document designed to educate the public about the possible legal avenues. She argued of this:

We [The Lesbian and Gay Legal Rights Service] felt that our community could not be asked to make decisions without being fully informed about the ramifications of becoming recognised by the law and an appreciation of the different ways in which law can be changed to recognise relationships. The *Bride Wore Pink* is a community law reform document but at first it was part of a community legal education process (Katzen, 2000).

The process of presenting options to this 'community'⁶⁸ revealed a number of concerns for the original proposition of relationship recognition and highlighted the fact that no one model of legal recognition would cater to all relationship needs presented by lesbians and gay men. Katzen recalls this process as one that highlighted the diversity between and within lesbian and gay communities even in a relatively limited geographical area such as Sydney. Not only were the prompts for legislative reform different in varying clusters, but the desire or not to have any legal recognition was also a key variant in the discussions (Katzen, 2000).

⁶⁷ This speech was delivered as a part of the NSW Attorney General's Office campaign to promote the PRA to lesbian and gay communities.

⁶⁸ Notably, this notion of community was isolated to the inner Sydney area. The consultation process was limited by funding and opportunity since the authors were volunteers working on behalf of a volunteer organization. This led to some major limitations in the consultation process, particularly, as Katzen herself noted, a lack of Indigenous representation (Katzen, 2000).

The Second Edition of TBWP proposed a de facto model of recognition based on pre-existing state legislation and required only the introduction of an amendment bill to parliament. It also argued for the recognition of a 'significant person' in some specific pieces of NSW legislation that would allow for the conferring of benefits, such as death benefits, by one person to a specifically nominated other person. Unlike de facto relationships, these two people need not be sexually involved with each other.⁶⁹ Proceeding Moore's bill, Australian Democrat Elizabeth Kirkby introduced the "De Facto Relationships Amendment Bill 1998" to NSW parliament, following the recommendations found in the Second Edition of TBWP and drafted in consultation with the GLRL. Jenni Millbank comments: "The Australian Democrats (NSW) introduced a Bill into the NSW Legislative Council (Upper House). The Bill was intended to enact the recommendations of *The Bride Wore Pink* by amending 53 Acts" (2000: 16). It provided for same sex couples to be fully included in the *De Facto Relationships Act (1984)* as well as proposing provisions for "domestic relationships", similar to those found in the PRA, without the necessary requirement of co-habitation. This bill was referred, without debate, to the Upper House Parliamentary Standing Committee on Social Issues.

⁶⁹ The Second Edition of TBWP recommended:

...we propose that the NSW state government be called upon to do the following:

1. immediately amend the De Facto Relationships Act (1984) to extend its definition of 'de facto relationships' to include lesbian and gay relationships, thereby extending all provisions of the Act to de facto partners in lesbian and gay relationships;
2. amend all Acts (see below) conferring rights or benefits on persons on the basis of their relationship with someone else so as to:
 - i. extend the definition of 'de facto relationships', where this expression is used, to include lesbian and gay relationships, and
 - ii. confer these same rights or benefits upon those who can legitimately claim to have been involved with a person in a 'significant personal relationship'.
3. allocate money and resources to the training of the judiciary and other decision-makers who will be responsible for making determinations based on these amendments, to address ignorance of, or prejudice against, gays, lesbians and our relationships.
4. Amend the Anti-Discrimination Act 1977 to include lesbian and gay relationships under the definition of marital status
5. allocate funds to an appropriate agency (such as the Law Reform Commission) to consider the question of relationships generally, including:
 - i. The appropriateness or otherwise of bestowing entitlements on the basis of relationships.
 - ii. the focussing on monogamy, exclusivity and blood relations,
 - iii. the need to replace the De Facto Relationships Act (1984) with an Act which bestows rights and entitlements on a broader concept of 'relationships', and
 - iv. The need to ensure that all people with disputes which are based on rights and obligations arising from relationships have access to an inexpensive and accessible forum for the resolution of these disputes, and to that extent, extending cross-vesting arrangements to enable same sex partners to access the Family Court in all circumstances.

These two bills then, based on recommendations contained within TBWP were not passed by NSW parliament. My principle contention is that this is because each model proposed by TBWP offered significant avenues towards the normalisation of same sex relationships and that parliamentary discourse in NSW is inherently heterosexist and therefore reliant on homosexuality being understood as deviant. The first, Moore's bill, redefined all concepts of legally sanctioned relationships. It introduced the concepts of homosexual relationships, platonic dependency and non-cohabiting sexual relationships. For a legal system which legislates towards the ideal of the married, heterosexual, co-habiting couple, this was a distinctly radical bill. The second, Kirkby's bill, suggested that homosexual relationships should be given the same recognition as heterosexual relationships. Further, this legal legitimisation existed in words and terms defined by gay men and lesbians. Its recognition of non co- habiting relationships acknowledged the variety of lesbian and gay relationships that exist, rather than being based on heterosexual relationships mapped out by marriage and de facto legislation. Again, this bill contained radical disruptive potential to a heteronormative society. This radical and disruptive potential can be measured in two ways: by the difference between existing legal knowledge about relationships (marriage and de facto laws) and those proposed in the legislation and by the level of threat posed to established notions of norm and deviance (heterosexuality and homosexuality accordingly). Overtly and purposefully, each unsuccessful bill proposed a radical detraction from established legal knowledges and norm/ deviant categories. Any political affiliations and complications aside, each bill, because of its radical potential, was threatening to a legal system that relies on these ideas to maintain the ability to govern and manage a population.

If we return to the earlier discussion of inclusion and exclusion as processes of governmentality (Chapter One), the radical disruptive potential of these two bills can articulated more clearly. Rose argues that the key impetus of governmentality is to incorporate individuals into governing structures in a way that affirms sets of established norms (1999: 240). He argues that where this is not possible, then exclusion is used as a governmental technique to neutralise the danger (read here as contradiction of the norm) that non-incorporated (or, deviant) individuals pose for the project of governmentality (1999: 240). The proposition of each unsuccessful Bill discussed above, is to include citizens into the apparatus of government, without making them adhere to the norms of established (heterosexually based) patterns of relationships. They

propose to incorporate those who have traditionally been excluded and labelled as deviant (people in same sex relationships) and in doing so, to 'endanger' the project of governmentality. This is how I conceptualise the Bills as holding great disruptive potential.

These discarded alternatives can be conceptualised as outlaw possibilities.⁷⁰ They represent truths and imaginings that are alternative to the established binary systems of liberal democratic rationality and yet they are perfectly reasonable legislative options that have variously been employed in other legal codes. The straddling of in law and out of law is seen in each of these examples. The disruptive outlaw potential contained within these two bills threatened the foundation of 'truth' of the NSW legal system in terms of relationship formations and understandings. This outlaw potential also made visible the margin of liberty, in turn making the management project vulnerable. This is the result of competing notions of truth and the power games that ensue when they meet. As Dean points out, "(t)he notion of government as the 'conduct of conduct' presupposes the primary freedom of those who are governed" (1999: 15) as well as those who govern. Whilst this is necessary for the success of many governmental techniques (particularly those based on self governance, where individuals must think in order to govern themselves towards norms) it is also an inherent danger to the project of governmentality (1999: 14-5).⁷¹ There is always the danger that alternative truths will be formed and the project of management will be endangered. I will explore this in greater depth in the next chapter when the parliamentary debate of the "Property (Relationships) Legislation Amendment Bill 1999" is analysed.

The particular point I want to focus on here is the way in which the two unsuccessful bills were silenced by parliament and the ways in which this protected the boundaries of the margin of liberty, ensured the continuation of the governmentality project, and in doing so, effectively silenced lesbian outlaw subject position. Because neither of these two bills reached their second reading in the NSW parliament, I will characterise their existence as a type of silence. Returning to the discussion in earlier chapters, silence needs to be understood in a dualistic manner as that which is not said and that which is

⁷⁰ For a similar and interesting argument following this logic in relation to Indigenous governance in Australia see O'Malley, 1998.

⁷¹ See my earlier discussion of freedom and governmentality in Chapter One.

not heard. Both of these bills were not said in that the parliament did not grant them the legitimacy of sustained debate. Similarly, they were not heard because they were not actualised as Acts of parliament- they did not become legal knowledge that could be articulated by courts or lawyers. This silence is tactical, achieving two primary goals. Silence, as Foucault describes it, is the necessary condition for chatter. Making these two bills silent, allows the continuation of dominant chatter (in this case marriage and *de facto* laws). It allows established norms and deviant categories to continue circulating without disruption from opposing knowledges. It also confines the margin of liberty, which solidifies the established program of governmentality. Each unsuccessful bill can be represented as expressions of the margin of liberty because of their resistant, disruptive intent. They presented alternative knowledges to established legal knowledges and thus belong to 'other' (outlaw) discursive rationalities. The silencing of these bills productively reinforced dominant binaries of sexuality and relationships in law and protected the project of governmentality by maintaining the barriers of the margin of liberty. This perception of rigidity excludes the plurality and multi-discursive possibility of the lesbian outlaw.

The significance of this reading of the two unsuccessful bills relates directly to the way in which the PRA came into existence. The next section will contend that the PRA, although conferring some rights and recognition to same sex couples, simultaneously reinforced homosexuality and same sex relationships as deviant to a heterosexual norm. This process mirrors the effect of the non-success of these two bills that would have put into place knowledges of same sex relationships that were not deviant. It also builds directly on the pattern of governmentality established in the side lining of the two bills. That is, it demonstrates the processes whereby the actions, and desired actions, of individuals are managed within heterosexist boundaries. This lends greater weight to this reading of their frustrated passage. This supposition is further supported through an understanding of the ways in which the PRA represents a thwarting of intent offered by TBWP. Although the recommendations of both editions were markedly different, the intent was the same- to fully enable people in same sex relationships to the same extent as people in heterosexual relationships under state laws. The effect of this would have two significant consequences: to remove the deviant status of homosexuality within relationship laws in NSW and to introduce to NSW legislation new ways of defining relationships that contradict the heteronormative framework of the two people in a

committed relationship such as is found in its ideal version in marriage laws. This can be described as an outlaw imagining and the project of governmentality has an overt necessity to prevent this in order to maintain its legitimacy. I want to explore this in relation to the process of redrafting TBWP and the translation of that redraft into the PRA.

The redraft of TBWP, and the move from a register model of recognition to the de facto model now found in the PRA however, was not only a result of feedback. It also reflected what the paper called "political feasibility." The Introduction to the Second Edition reads in part:

Almost one year later, we have revised the discussion paper and altered our recommendations. This revision is a result of consideration of some written submissions, opinions expressed by members of the communities at forums organised by the Legal Rights Service and the Lobby and further thought about the political feasibility of the opinions we initially recommended. Our aim has been to achieve effective law reform which will have practical consequences for lesbians and gay men in NSW (Katzen and Shaw, 1994).

This is a carefully worded statement that emphasises the need for law reform and the willingness to forego interventions into traditional legal understandings of relationships in order to achieve this end. The paramount concern for the Lesbian and Gay Legal Rights Service in the production of TBWP was to propose models of relationship recognition that would significantly and overtly ease the discriminatory effects of relationship laws in NSW. The key experience under consideration at this particular time was the lack of rights accorded to gay men when a partner died of HIV/ AIDS related illnesses. This included a lack of provision for intestate wills, hospital rights such as visitation and decision making capabilities and funeral rights.

What motivated this change of emphasis in the redraft, was, in part, a decision to work within pre-existing laws to enhance the likelihood of executing "practical consequences" for lesbians and gay men. The likelihood of amending existing legislation appeared greater than the introduction of entirely new legislation. This presumption appears to be validated when the actual path of legislative attempts is charted as will be explored below. Initially however, I want to explore this notion of "political feasibility". If we are to accept Foucault's argument that laws are contained within a project of governmentality, then we must be wary of the notion of 'reform' and

'rights' that are associated with legislation. At the very least, there is a dualistic function that is in part enabling and in part regulatory.⁷² The weight of regulatory function, particularly in legislation that relates to lesbians and gay men, is often greater than the intended enabling effects. Although legislation such as the PRA removes some legal prohibitions and some forms of legal discrimination, it also performs an overt actual and symbolic function of regulation, particularly towards a heterosexual norm. What is significant about governmentality, what marks it from the dictatorial and what allows it to function within liberal democratic notions of freedom and liberty is the margin of liberty. The margin of liberty however, is closely guarded if governmentality is to function. If resistance was a real and valid option, then governmentality would fall apart. I would argue that the "political feasibility" that the Lesbian and Gay Legal Rights Service identified in the Second Edition of TBWP was not simply a material political reality, but also a symbolic reality established in defence of the margin of liberty. As I will continue to argue in my analysis of the unsuccessful bills prior to the PRLAB, a heteronormative society, one which relies on a basic understanding of norm and deviant to maintain its inherent logic, cannot fully enable lesbians and gay men because they function as the symbolic 'deviant' against which heterosexuality is measured. Hence, in order to establish some rights for lesbians and gay men and in order to circumvent some of the pain and indignation that people in same sex relationships had been experiencing because of legal discrimination, the Lesbian and Gay legal Rights Service had to propose a model of recognition that would not significantly alter this basis.

Political feasibility in this reading, equates to agreement (whether overt or not) to work within the given discourse and not to expose the margin of liberty in the process. O'Malley argues that the process of governmentality often involves 'translating' and 'subjugating' resistance into governing domains so that the effect of that resistance is 'neutralised' (1998: 169). This is akin to my description here of TBWP. That is, the impetus for law reform that recognises lesbians and gay men is translated into pre-existing relationship types. It is subjugated in the settlement for partial rights rather than full rights. It is neutralised in the settlement for "practical consequences" rather than

⁷² See my earlier discussion of laws as a technology of government in Chapter One. For further discussion see: Dean, 1999 and Rose, 1999. For analyses of how laws have been used as technologies of government in other situations see: Ballard, 1998; Dowsett, 1998; O'Malley, 1998.

holding out for full legal recognition. This phrase also represents an agreement to forego alternative truths such as the imaginings of lesbian outlaw discourse and in doing so, an agreement too, to forego full recognition of lesbian and gay relationships since in law rationalities centre on the deviancy of homosexuality. This agreement was both an overt and an unintentional one. My prompting to suggest some overt recognition of this comes from the following comment made in the Second Edition of TBWP: "With benefits come obligations. The sad but realistic truth is that if we want recognition, we will have to forgo some benefits." These benefits could be read at two levels. The legal invisibility of same sex partners can lead to particular benefits. For example, taxation and government payments are moderated according to family status and two people could potentially be financially better off as individuals under these laws than as a couple. Of course, this is not always the case. However, the Second Edition of TBWP stated that this was a concern some people noted in the consultation process:

...many people were reluctant to see any recognition. They wanted to be treated as individuals and saw danger in inclusion in the mainstream system of relationship law which they saw as being based on concepts of dependence and disempowerment (Katzen and Shaw, 1994).

The second way that this foregoing of benefits can be read is to suggest that the opportunity to re-write the basis of legal understandings of relationships is being lost by agreeing to 'amend' existing legislation based on heterosexual relationships such as marriage. This can be seen in the concern expressed above relating to dependence and disempowerment. There is a suggestion in this claim that there are other rational possibilities- outlaw possibilities that would be superseded by inclusion in law.

There are however also an overwhelming number of comments that indicate that this agreement to formulate same sex relationships within a heterosexist discourse was unintentional. I make this claim in tandem with comments from others involved in the production of TBWP. Jenni Millbank for example, was a member of the GLRL at the time and comments that the intention of the lobby in proposing the de facto model of relationship recognition was to be as encompassing as possible and to institute "the symbolism of formal equality" (2000: 17). She notes however, that this was not intended to be sufficient in and of itself:

Support for broader, non-couple focused relationship recognition was very strong within the community, as was concern that couples who did not cohabit should be afforded some

measure of recognition. Within the GLRL itself, support for broader based recognition was strongly informed by feminist analysis of marriage and family.

The category of domestic relationship, encompassing emotional and financial interdependence in a relationship that need not be sexual nor cohabiting, was proposed as some redress for these concerns (Millbank, 2000: 17).

Instituting the type of recognition offered by the PRA then was envisaged as the beginning of a larger project that would encompass some outlaw elements eventually. Although the carer definition within the PRA goes some way towards realising this concern, the potential is not fully met because of the refusal to acknowledge relationships that are non-cohabiting. My firm contention is that this condition of the PRA is one that has been used to delineate the legislation as reinforcing and rewarding 'acceptable' relationships, such as carer relationships, within NSW legislation (considered in greater detail in the following chapter). It has not, by any means been envisaged as a radical clause to recognise people in same sex relationships that do not fall under the conditions of a de facto relationship. Nor is it legally capable of conferring such rights as the option above proposed.

This specific problem was outlined in the Second Edition of TBWP when it was argued that the diversity of 'relationships' amongst lesbians and gay men was great as was the range of relationship types that people felt should be recognised under laws. The provision for recognition of significant personal relationships in amending de facto laws was proposed in reaction to this:

The law fails to give recognition to a whole range of relationships. Consequently, people who are not in de facto relationships are generally unable to utilise the law to benefit whom they choose. Also people who are in de facto relationships but would choose to benefit a person other than their de facto spouse are unable to do so. The aim of amending specific legislation to includes recognition of a significant person is to enable these people to benefit whom they choose (Katzen and Shaw, 1994).

However, the carer provisions of the PRA that are the closest parallel to this description, do not meet this desire.

Millbank further comments that the proposed relationship models offered in TBWP were intended to avoid the rendering of same sex relationships to an inferior legal status in comparison to heterosexual relationships. She argues:

...the bundling up of same sex relationships with 'other' relationships was considered undesirable from both a symbolic and practical viewpoint. It was therefore proposed that

couple and non-couple relationship recognition be identified and pursued as separate issues (Millbank, 2000: 18).

Again, this is an intention offered in TBWP that did not eventuate in its interpretation through parliament as is evident in my earlier description of the homosexual legislative self that emerged from this legislation. The "political feasibility" then, was not congruent with the intentions of TBWP.

I want to return here, to the ideas about the vulnerability of truth as law. If we are to accept that the Australian legislative system is essentially heterosexist, then marriage laws are the necessary centrepieces of privilege associated with the heterosexual norm. They both ensure and reward the propelling of heterosexist ordering. This is evidenced by the hierarchy of privilege associated with legislation governing different relationship types- marriage laws followed by heterosexual de facto provisions, followed, at least in NSW, by same sex de facto provisions. Each version of recognition mimics the one before it, but systematically falls short in terms of its scope of recognition. When a claim is made to this type of legal system that does not follow this 'mimetic but less' equation, such as a claim for same sex relationship registration, two primary things occur. First, the ordering unit for truth is destabilised as marriage becomes less the measure of comparison. Certainly, the tradition of heterosexual marriage does not disappear and as such it maintains still a central position in relationship ordering. However, the measure of recognition for same sex relationships does not originate in marriage as is the case in de facto laws. Second, and as a consequence, the threat to usurp deviance is posed by an 'other' (outlaw) type arrangement such as relationship registers. Again, this is because marriage is decentred and other truths, other managing systems are put into place.

The logic of governmentality that poses law as a truth teller is to protect its foundational categories of truth, norm and deviance.⁷³ When I read "political feasibility" I am confronted with a number of images: lobbyists taking whatever path necessary to initiate the first comprehensive legal recognition of same sex relationships in Australia; endless political conversations behind closed doors to shore up bi-partisan support; an Australia where the Prime Minister regularly opposes reforms to legislation that would

⁷³ See my earlier discussion of the fundamental role of law within the project of governmentality at Chapter One.

remove discriminatory acts towards lesbians and gay men. I am also confronted however, with the overtones of limitation that it implies and because of this the “political feasibility” is directly associated with defending a heterosexist legal truth and maintaining the defence of the margin of liberty. This is an idea I will expand on further throughout this and the next two chapters.

Foucault’s concept of regulation, expressed as population management, is more subtle than the simple version of repression found in prohibitive legislation such as sodomy and buggery laws, versions of which were found in Australian penal codes until 1997. Governmentality aims to regulate an individual’s behaviour at the fundamental level of choice and action, aiming to create active participants in a process of conduct management (Foucault, 1991b: 94; Dean, 1999: 12; Rose, 1999: 233). As discussed in Chapter One, self governance is key to the project of governmentality. At the same time the PRA accords fundamental rights, it does so within a discourse of government, as part of a project of management. Underlying this is a heteronormative foundation where the ‘conduct of conduct’, the regulation of behaviour, is towards the maintenance of a heterosexual norm. Bringing the relationships of lesbians and gay men within the realm of the law through the PRA is bringing them within this project of management. This also excludes lesbian outlaw discourse by obscuring the margin of liberty. The PRA acts to contain same sex relationships by promoting their ‘legitimate’ representation and knowledge within legal truths. The initial impetus for legislative reform was certainly community based and the outcomes have been met at least in part with the various rights the PRA accords. However, the flip side of management and the various ramifications this has on law as truth are what I want to explore. The introduction to this chapter suggested that lesbian and gay law reform has reconstructed legal knowledge and law as truth. What I want to turn to now then, are the various possibilities of that reconstruction process that were proposed but did not come to fruition under NSW parliament prior to 1999. This rejection process of possible truths begins with the “political feasibility” of lobby recommendations, but plays out more succinctly in the parliament itself. The process is an act, a game of truth, designed to contain the level of disruption to the supremacy of heterosexuality, which an open acknowledgement and legitimisation of same sex relationships could entail.

4.4 The PRA⁷⁴

Outlaw possibilities, such as I have characterised above, are truths and knowledges contained within the margin of liberty. An outlaw analysis highlights not only these possibilities, but also the processes that enable or pervert their realisation. In this section I will examine the specific nature of the PRA as just such a perverter. The PRA instituted what were, at the time, the most broad and extensive legal recognition of same sex relationships in Australian law and as such, the PRA is a significant piece of legislation in terms of legal affect and symbolism. The PRA established a truth about same sex relationships that maintains the deviant ordering of homosexuality in a heterosexist discourse. This has been evidenced above through a discussion of the processes of subjugating the intent of *The Bride Wore Pink* and the systematic rejection of other Bills that have taken place through parliamentary discourse. The dominant ideology of the parliamentary discourse has maintained the norm/ deviant praxis associated with heterosexuality and homosexuality in both these processes and, as I will argue in this section, through the articulation of the PRA itself.

The PRA must not simply be read in and of itself but also as a part of the more linear history of lesbian and gay based lobbying and legal change- including the two preceding and unsuccessful bills discussed above. When the PRA is compared to the potential models of recognition that had previously come before parliament, its scope of recognition at both the numerical level in terms of the Acts it covers and its ambit in terms of who qualifies for recognition shows it to be decidedly less. Similarly, the scope and ambit of the legislation provided through the PRA are less for same sex relationships than for heterosexual relationships as the following discussion will examine.

The basis of this differential treatment between relationship types is historical in the NSW legislative system. That separate legislative jurisdictions and codes exist between marriage and de facto relationships in law is indicative of the differences assumed between the two legal truths. In *Evans v Marmot* (1997) part of the joint judgement of Gleeson CJ, and McClelland CJ reads:

⁷⁴ This section draws on: Cahill, 2002. My thanks go to the anonymous referees for their comments on this article.

One thing is clear. It was not the intention of the NSW Parliament in 1984 to equate de facto relationships with marriage, or to make the same provisions with respect to de facto partners as the *Family Law Act* at that time, made with respect to married people.

There are some similarities between the provisions of the *Family Law Act* and those of the *De Facto Relationships Act*. There are also differences. Those differences are substantial, conspicuous and deliberate (quoted in Rees, 2004).

As a legislative expansion of the *De Facto Relationships Act 1984 (NSW)*, the PRA can be read also as an expansion of this “substantial, conspicuous and deliberate” construction of legal difference between relationship types. What is particular about the PRA however is that it adds a third and fourth tier to this differential relationship construction- constructing same sex relationships below heterosexual relationships in this typology.

The deliberate disparity of recognition, enablement and effect between heterosexual relationships and same sex de facto relationships is obvious in a number of key applications and wordings of the PRA. The most overt instance of this delineating process is found in the wording of s.62 of the Act, which reads:

62 Effect of Property (Relationships) Legislation Amendment Act 1999

Nothing in the *Property (Relationships) Legislation Amendment Act 1999* is to be taken to approve, endorse or initiate any change in the marriage relationship, which by law must be between persons of the opposite sex, nor entitle any person to seek to adopt a child unless otherwise entitled to by law.

This final section of the PRA in no uncertain terms, differentiates between the privileges offered to married couples and de facto couples and between the entitlements (namely access to adoption) of heterosexual couples (be they married or de facto) and same sex de facto relationships. This wording deliberately constructs the truth of same sex relationships as overtly less in stature than heterosexual relationships. The second and more systematic difference between heterosexual relationships and same sex relationships that is constructed through the PRA is found in the scope of affect. The "Property (Relationships) Legislation Amendment Bill" amended some 21 Acts in NSW law to include the gender neutral definition of de facto relationship. However, this left a significant number (more than 30) of other Acts where the definition of de facto relationship was unaffected. That is, approximately thirty Acts of NSW legislation

preserved the exclusively heterosexual definition of a de facto relationship despite the passage of the PRA.⁷⁵

The following fictitious scenarios illustrate the degrees of disparity between heterosexual relationships and same sex relationships that the PRA has instituted.⁷⁶

Ramona lives in an inner city Sydney suburb. Her partner of six years, Sylvia, lives an hour and a half away in Wollongong.⁷⁷ While their work commitments do play a factor in their living arrangements, they also believe that their love does not have to translate into co-habitation. They realised quite early in their relationship that their independence made them both strong and happy and have spent alternative weekends at the other's house for the past four years. Despite happiness, love and commitment, Ramona and Sylvia are not in a relationship recognised by the PRA. Ramona and Steve⁷⁸ are similarly not recognised by the PRA however, they do have the option of getting married and having their relationship legally recognised at both federal and state levels. They could both pitch in for the cost of a second lounge for Steve's apartment; could go halves in the roof repair bill for Ramona's inner city town house, safe in the knowledge that should their relationship disintegrate, the courts will hear their claims on both properties and contents. They would also have recourse within the Family Court for meeting their future needs should one person in the relationship suffer a greater financial hardship than the other because of the relationship break up.

Megan and Catherine are ex-lovers who are co-parenting their son William, conceived through IVF⁷⁹ and born to Megan.⁸⁰ Both women consider themselves and each other as William's parent.⁸¹ Both women are free to pursue relationships with other people although they have agreed to continue exclusively co-habiting with each other until William is at least six years old. Despite mutual consent, stability and co-parenting.

⁷⁵ This scope was amended in 2002 with the *Miscellaneous Acts Amendment (Relationships) Act 2002 (NSW)*. See my notes in the Introduction of this thesis.

⁷⁶ These examples were also given in the following article: Cahill, E. (2001) "Chasing Rainbows: Thoughts on lesbian and gay equality" in *Word is Out* 1: 1-6. Available on-line at <<http://www.wordisout.info>> (Accessed 16/06/02). My thanks go to Craig Johnston for constructive comments on earlier versions of this article.

⁷⁷ The NSW Legislative Council Committee on Social Issues noted that "there are indeed couples in committed relationships who do not cohabit" (1999: 48) citing a survey by the Australian Institute of Family Studies in 1996 that found 6% of people interviewed were in such a position. The Committee also noted that lesbians and gay men may have a greater frequency of non-cohabitation, in part due to social and familial pressures.

⁷⁸ As the heterosexual comparison.

⁷⁹ In vitro Fertilisation as it is known medically or alternative fertilisation methods as it is referred to in many lesbian specific publications (Secomb, 1995).

⁸⁰ A study in 2002 by Jenni Millbank for the Gay and Lesbian Rights Lobby (NSW) argued that in Australia "between 15-20% of lesbians have children" and that "this proportion is likely to increase in the next 5 years" (Millbank, 2002: 6).

⁸¹ Although a co-mother may apply for a Parenting Order from the Family Court (as may any other person who can make a significant claim to the 'care, welfare and development' of a child) there is no automatic or guaranteed recognition of a co-mother under the *Status of Children Act 1996 (NSW)* even if the child was born with mutual consent into the relationship. Jenni Millbank and Kathy Sant point out that: "(w)hile joint parenting orders under the federal *Family Law Act 1975 (Cth)* can accord a co-parent a range of rights, they do not necessarily impact upon the definition of 'parent' and 'child' under NSW laws. Nor do such provisions assist children whose parents have not successfully completed this process" (2000: 30). A co-mother cannot adopt her child either, as a step-parent who is heterosexual is able to do under the *Adoption Act 2000 (NSW)*. See information booklet produced by the NSW government on the PRA: *Acts of Passion* <<http://www.actsofpassion.nsw.gov.au>> (Accessed 12/01/04).

Megan and Catherine are not in a legal relationship.⁸² Alternatively, Megan and *Carl*⁸³ would both be William's parents, their names would both be on his birth certificate. No matter which adult relationships they pursued outside of that relationship, their parentage would not be under threat. For the purposes of taxation and other government payment systems, they would also be recognised as having a relationship towards one another. Similarly, both would be held accountable, by law, for their child, should the co-habiting arrangements ever reach a less amicable situation.

I am under no illusion that there will ever be one style or type of relationship recognition that will encompass the myriad of experiences that individuals create. The charge I make of the PRA is not that it does not recognise all types of same sex relationships. What I contend is that it does not recognise same sex relationships with the same degree of legitimacy as heterosexual relationships. The effect of this is to preclude the lesbian outlaw subject position from legitimacy, in particular, by refusing to legitimate the characteristics of same sex relationships.

The lesbian outlaw as both discourse and subject position, is closely connected to the lived experience of lesbians since the power/ knowledge of each often share discursive situations and characteristics. More particularly, lesbian outlaw possibilities emerge from these points. Ramona and Sylvia in the first scenario represent a specific pattern of relationship that is characteristically 'outlaw'- it functions without reference to legal norms, particularly that of co-habitation. Through the PRA however, this relationship and lesbian outlaw possibility, is rendered invisible. Ramona and Sylvia are party to a relationship that cannot, under any circumstances, be legally recognised in the NSW jurisdiction because they do not cohabit. The non-cohabitation of Ramona and Steve however, is of a lesser consequence if the two are prepared to enter into marriage. Certainly, this is not to say that all heterosexual couples desire marriage as the ultimate realisation of their relationship but it is to say that the option is available whereas for same sex couples it is not. Section 17(1) of the PRA reads:

17 Prerequisites for making of order—length of relationship etc

(1) Except as provided by subsection (2), a court shall not make an order under this Part unless it is satisfied that the parties to the application have lived together in a domestic relationship for a period of not less than 2 years.

⁸² Either with each other or, in Catherine's case with her son William. See my later discussion in this chapter regarding s.5(3) of the PRA.

⁸³ Again, as the heterosexual comparison.

The PRA requires a two year cohabitation period before the people involved can be said to be party to a de facto relationship. Holidays and periods apart may be considered not to interfere with the delineation of this period under some circumstances as the following comment from Mahoney J.A. in the Court of Appeal in Hibbertson v George (1989) indicates:

It is correct... that the relevant relationship may continue notwithstanding that the parties are apart, for example on holidays... There is, of course more to a relevant relationship than living in the same house... The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this (quoted in Rees, 2004).

However, cohabitation, like other factors, forms the base from which only judicial interpretation, such as is indicated in Mahoney J.A.'s finding above, can vary (discussed further in Chapters Seven and Eight). There is however, one exception to this cohabitation rule and that is if the couple in question are parenting a child together. Subsection (2) mentioned above in s.17(1) above reads:

- (2) A court may make an order under this Part where it is satisfied:
 - (a) that there is a child of the parties to the application, or
 - (b) that the applicant:
 - (i) has made substantial contributions of the kind referred to in section 20 (1) (a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made, or
 - (ii) has the care and control of a child of the respondent.
- and that the failure to make the order would result in serious injustice to the applicant.

In other words, if the de facto relationship includes a child then the court is able to waive the cohabitation requirement. If Ramona and Steve then, became the parents of William, there is the potential for their relationship to be acknowledged under the PRA without the need for them to marry. As the second scenario suggests however, this would not be the case if Ramona and Sylvia were parents. This again serves to highlight the degree to which the PRA deliberately acts to delineate privilege according to sexuality.

In Foucaultian terms, the definitions of relationships in the PRA construct both norm and deviant relationship types. However, it also acts to silence other possibilities. In the second scenario Megan and Catherine represent an increasing trend in lesbian

relationship types- lesbian parenting. This is a lesbian outlaw possibility that is vehemently attacked and silenced by legal discourse in Australia as elsewhere (see Chapters Seven and Eight). As co-parents to William, Megan and Catherine have neither a relationship with one another nor, in the case of Catherine, does she have a relationship with William under the PRA or any other piece of legislation in NSW. In contrast, under the *Status of Children Act 1996 (NSW)* Megan and Carl would both be legal parents to their child who was also conceived through IVF. Legally, Megan is a biological parent and Carl is a presumptive parent. Carl and Catherine can be parenting children who have the same donor father, anonymous and unrelated to all concerned but legally only the relationship between Carl and his child will be recognised through NSW law. Because of this, and acting as a reinforcer to this, the PRA recognises only the parental relationship between a heterosexual de facto parent and their child. This scenario has not been tested in the Family Court (See Chapters Seven and Eight) however two things are evident that would lend weight to this intentional division in the PRA. The first is the specific wording of s.5(3) of the PRA which reads:

(3) A reference in this Act to a child of the parties to a domestic relationship is a reference to any of the following:

(a) a child born as a result of sexual relations between the parties.

(b) a child adopted by both parties.

(c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman:

(i) of whom the man is the father, or

(ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father, except where such a presumption is rebutted.

(d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

There is little subtlety in these descriptions. If a child is not the direct result of a sexual relationship then the PRA requires that a child of a relationship only be found if that relationship is heterosexual. There may be some, although again as yet untested, potential under the final clause of this section. Millbank and Kathy Sant argue that the wording of this section: "a child for whose long-term welfare both parties have parental responsibility" (2000) may be read as inclusive of co-parents. They also suggest that a child and co-parent may be covered in the term "domestic relationship" where it appears in Acts affected by the PRA. Taken together, the Act confers rights to the

children of unrelated co-parents in a small number of areas: property division, family provision, (limited) child support, bail, some trusts, coronial matters and stamp duty. These areas are clearly of a considerably lesser scope than the full range of parental rights and obligations under NSW law (2000: 30-31).

Given the courts' reluctance to date to even recognise a same sex relationship as I will discuss in Chapters Seven and Eight, and given the conservative backlash in recent times against all ideas of lesbian and gay parenting, the possibilities of this legal interpretation seem somewhat optimistic in the face of extreme discrimination and hardship. As a legal possibility it does not negate the actuality of the PRA as a divisive piece of legislation that establishes a legally sanctioned hierarchy where same sex relationships are the deviant lesser measure to the heterosexual norm.

The scope of this hierarchy was reduced somewhat during the writing of the thesis. In 2002 the "Miscellaneous Acts Amendment (Relationships) Bill 2002" (MARB) passed through NSW parliament, amending the PRA. This piece of legislation brought a broader ambit of NSW Acts in line with the new definition of de facto that the PRA had instituted two years before. However, even granted that broader ambit, the tiered system of relationship recognition remains in place. The NSW Anti-Discrimination Board (2002) has identified ten Acts⁸⁴ that still require adjustment to remove the tiered system of de facto relationship recognition in NSW.⁸⁵ This includes the PRA itself, which the Board identifies as perpetuating inequalities and discrimination that cannot be addressed through Anti-Discrimination legislation:

Sections 4 and 5 [of the PRA] redefines the terms 'de facto' and 'domestic relationship' to include same sex relationships "for the purposes of this Act". This does not amend the definition of de facto in other legislation unless otherwise stated....Consequently, numerous statutes which discriminate against gay men and lesbians by failing to include their relationships within the definition of de facto continue unamended [even after the passage of the MARB]. Acts done in accordance with these unamended statutes cannot be challenged under the *Anti-Discrimination Act*... (2002)

⁸⁴ *Anti-Discrimination Act 1977; Coal And Shale Mine Workers (Superannuation) Act 1941; Human Tissues Act 1984; Local Government Act 1993; Property (Relationships) Act 1984; Public Authorities Superannuation Act 1985; Public Sector Employment and Management Act 2002; Rural Lands Protection Act 1998; Status of Children Act 1996; Crimes Act 1900.*

⁸⁵ Note one of these, the *Crimes Act 1900* has since been amended in a separate bill in 2002. "The Crimes Amendment (Sexual Offences) Bill 2003" altered the age of consent for male homosexual sex in NSW from 18 to 16, bringing it in line with heterosexual ages of consent.

Similarly, the board identifies the non-recognition of gay and lesbian couples who are parenting as a significant distinction between the recognition of heterosexual and same sex de facto couples, as the second example above indicates.

As a political tactic, the Gay and Lesbian Rights Lobby have identified such issues as “anomalies” of the PRA, in need of amendment (quoted in NSW Legislative Council Standing Committee on Social Issues, 1999). My assessment is less forgiving. What the PRA (including its amendments) does not cover is both systematic and deliberate, as future chapters will indicate, which makes it symbolically significant. I would argue that the systematic normalisation of heterosexuality through legislative protection and privilege has not been compromised through the introduction of the PRA. Through the Act the homosexual legislative self, the self before the law, has certainly been enabled when compared to the prohibited self, which can be traced through Australian legal history. However, using Foucault to analyse the Act, demonstrates the striking inconsistencies and the omissions of the legislation. As I argued earlier, the legislative system in Australia is firmly heterosexist in its foundation, it will not elect to create or endorse an other way of functioning, which challenged the norm of heterosexuality. Indeed, my analysis of Foucault’s work indicates that it would actively create categories of deviance against which it could situate its heterosexual norm. This, I believe, is a partial explanation of the shape of the PRA.

From the PRA emerges a new being, a legally sanctioned homosexual. The inconsistencies of the legislation and its omissions discussed above, formulate this legally sanctioned homosexual as distinctly less than the heterosexual ideal. The deviant category has not changed. Perhaps it is made more subtle being framed by long sought after and much needed rights for lesbians and gay men, but the deviant category is still there. So, the legally sanctioned homosexual does not parent. Her/ his rights are piecemeal. She/ he has limited access to legal redress. Foucault has suggested that the aim of government is to affect the “margin of liberty” of individuals, to influence their choices. The process described above, the value judgements, the positioning of lesbian and gay relationships as deviant, all aim to affect the choices people make. They aim to

limit many of the choices gay men and lesbians make to the realm of deviant.⁸⁶ The law is certainly not the synthesis of our self construction. Of course, lesbians and gay men parent. Relationships are formed which vary from the new de facto definition and are accorded value. However, if we return to Foucault's ideal functioning of governmentality, we can gauge the importance of law, and the PRA in particular. In its ideal state of functioning, agents become self-regulating because alternatives appear not to exist. This is how the legally sanctioned homosexual works. By not mentioning adoption laws the PRA does not present the possibility of lesbian and gay parenting. By not according full rights to one partner after the other's death, the possibility of their relationship being accorded full credit is not presented. The rule of cohabitation does not present the possibility for other forms of relationships to be considered legitimate. The possibility of lesbian and gay relationships has been presented by this legislation, but this is within a limited field of possibilities, determined by a society whose ultimate aim is to maintain its inherent heterosexist nature. The lesbian outlaw, and outlaw possibilities, are rendered invisible by this legislation.⁸⁷

4.5 Conclusion

The silence of same sex relationships in NSW legislation had oppressive effects in a manner that was both personally and politically affronting to those affected. The PRA offers a form of legal relief from some of these effects for some people in same sex relationships. This is an achievement led by the Gay and Lesbian Rights Lobby (NSW) and prompted through their production of *The Bride Wore Pink*. The PRA is an interpretation of need and response based firmly within liberal democratic rationalities and politics. Such an interpretation however, does not account for the symbolic implications of the legislation. The PRA introduces the deviant but enabled homosexual legislative self into NSW legislation. It establishes a legally sanctioned hierarchy of relationship type. Correspondingly, it also establishes a new knowledge about same sex

⁸⁶ Rose describes the conduct of conduct as a process of "logic of choice" - whereby choice is presented to individuals in a formulated and controlled manner (within the project of governmentality) so that other options (for example, what I have described previously as outlaw options) are less likely to be considered or seen as feasible (1999: 88). See my earlier discussion too, in Chapter One regarding freedom since limiting choices is in some respects also limiting freedoms.

⁸⁷ It is important to note here that I am not suggesting that lesbians and gay men become complete self regulating 'deviants' through the PRA. To the contrary, Chapters Seven and Eight will indicate that this is far from the evidence found in my interviews. What I am claiming here is that the *intent* of the PRA *within* a project of governmentality can be considered regulatory.

relationships in NSW law- a 'truth' that does not undermine the basic dualisms of norm and deviant marking the foundation of 'the conduct of conduct'. For this reason, I argue that the PRA is firmly and rightfully situated within the project of governmentality perpetuated by a heterosexist-based society.

The need for legislation such as the PRA, as I will explore further in the next chapter, made a vulnerability of legal truth visible in NSW law. This was evidenced through the alternative Bills presented to parliament prior to the enactment of the PRA itself. However, the legal truth of the PRA both superseded and de-legitimised alternative imaginings of same sex relationship recognition and hence prevented outlaw possibilities from entering the NSW legislative system. The result is a piece of legislation that enables to an extent, but does not institute the multiplicity, justice or freedom that an outlaw alternative would more likely have presented. The desirability of outlaw options being incorporated into in-law systems (ie: the NSW legal system) will be discussed in Chapter Seven. The following two chapters however, will continue this outlaw approach to the PRA and examine the processes involved in its passage and in the project of denying outlaw possibilities and 'truths'.

Chapter Five

Negotiating Truth:

Analysing the Parliamentary Debate about the PRA

Written on the body is a secret code only visible in certain lights; the accumulations of a lifetime gather there. In places the palimpsest is so heavily worked that the letters feel like Braille. I like to keep my body rolled up away from prying eyes. Never unfold too much, tell the whole story... (Jeannette Winterson, 1992: 89)

5.1 Introduction

The chapter analyses the parliamentary debate surrounding the "Property Relationships Legislation Amendment Bill 1999" (the PRLAB) that later became the *Property (Relationships) Act 1984 (NSW)*. Linking the chapter to the previous one, it makes an argument that the parliamentary debate illustrates the negotiation process of the new legal truth- the deviant homosexual being- found in the PRA. The specific process of negotiation involved in producing, naming and characterising this new being are explored. The PRLAB was debated in NSW Parliament between 13 May 1999 and 1 June 1999. It received bi-partisan support and was passed in both houses of parliament by a large and then unanimous majority.⁸⁸ Despite this ease of passage however, the parliamentary debate reveals that parliamentarian's opinions and interpretations of the PRLAB are not as clear-cut as may be suggested. In the previous chapter I argued that the PRA produced in law a newly enabled figure. In this chapter I will take up Foucault's challenge to explore this construction by analysing the various debates.

The chapter conducts a lesbian outlaw analysis aimed at unravelling the deployment of sexuality within the PRLAB debates. The debate narratives of the PRLAB into three types: supporting, oppositional and (a type of) acquiescence. It argues that the issue of sexuality (rather than relationships, upon which the Bill is ostensibly based) is key to each of these narrative types, but in different ways. It argues that those narratives wholly supportive, or overtly against the Bill, 'speak sex', as Foucault says, in an obvious manner. Sexuality is spoken into and out of deviance in these narratives, in a negotiation process for a new 'truth'. The third type of debate, that of acquiescence, is

⁸⁸ Vote in the New South Wales Legislative Council was 36 to 3.

argued as an exceptional category that provides greater insight into the framing of the PRA. These narratives contained oppositional statements to the Bill, but resulted in a practice of support for the legislation. Indeed, the largest number of statements resistant to the legislation came from the Legislative Assembly where the bill was passed without opposition. Given this refusal to support it overtly, and the various other negative statements made by politicians who stated they did not support the bill in its entirety but voted for it, the chapter argues that the majority of support for the legislation can be read as a type of acquiescence. The narratives of acquiescent law reform distanced the bill from this specific in a deliberate political tactic to ensure the expediency of passage for this new piece of legislation. The entirety of the debate then, I would argue, can be understood within a procedural framework of 'speaking sex' in Foucaultian terms.

Each example in this analysis, illustrates the tensions tied to the transgression of truth as a singular concept. The PRLAB comes into being through these debates with the fixed job of protecting the margin of liberty against claims of other power/ knowledge such as is represented by lesbian outlaw discourse. My central contention is that the PRLAB was framed in the majority of parliamentary debates, and passed by the majority of parliamentarians, to ensure its role as a kind of gatekeeper to the truth of law. This is true to such an extent that the parliamentarians often speak to deliberately mask this vulnerability. Moreover, to mask lesbian outlaw options, some of which I also discussed in the previous chapter, that appear when the margin of liberty becomes visible.

5.2 Methodology

The chapter examines parliamentary debate surrounding the PRLAB in the NSW Legislative Council and Legislative Assembly. The parliamentary debate represents many of the concerns and ideas regarding the legislation that circulate within the broader public. To analyse the parliamentary debate is also to analyse the liberal democratic processes that brought the PRA into being. Reading the debates as a process of negotiating and labelling the legislative being that the Act creates also gives insight into these liberal democratic rationalities. If the criticisms of liberal democracy that I outlined in Chapter One are to be tested, then these are essential avenues of inquiry. The Parliamentary debates are public processes that govern and regulate the systems under

which we, as citizens, live. The debates interpret and govern at the practical level then, and as such, will give insight into the actuality of the Bill and resulting legislation. However, the parliamentary debate can also be analysed for its symbolic significance. As Jennifer Lynne Smith has argued, policy analysis such as this one, investigates not only the legislation under scrutiny but the more “unintended” symbolic ramifications and the processes of construction that occur within the debate- of identities and of governable borders (2003: 83-84). If we are to take a Foucaultian approach to the debate, it will be particularly telling of the governing intent of the legislation. This lies particularly in an analysis of statements of intent and interpretation surrounding the proposed legislation. The chapter then, is both a policy analysis and a narrative analysis aimed at the material and symbolic interpretations of the PRA.

Foucault’s notion of speaking sex is employed to analyse the parliamentary debates. Foucault argues that we willingly imagine ourselves in a Victorian regime where sexuality is repressed, as opposed to the image of a proliferation of sexuality that he describes has actually occurred (Foucault, 1980a: 3). In setting up this Victorian regime, Foucault argues, the antithesis of repression (read as silence), is talk. Talk holds the promise of liberation and freedom, the transcendence of schematic repression. He argues:

What sustains our eagerness to speak of sex in terms of repression is doubtless this opportunity to speak out against the powers that be, to utter truths and promise bliss, to link together entitlement, liberation, and manifold pleasures; to pronounce a discourse that combines the fervour of knowledge, the determination to change the laws and the longing for the garden of earthly delights (1980a: 6).

Freedom and liberation lie in the ability to articulate something where there is nothing. This image of surpassing power, the enticement towards liberation, Foucault argues, serves to justify and propel sex chatter. More than this, he argues, it serves to gratify. The “speaker’s benefit” (1980a: 6), as Foucault discusses it, is to break from repression, to be outside of power. He says: “A person who holds forth in such language places himself to a certain extent outside of the reach of power; he upsets established law; he somehow anticipates the coming freedom” (1980a: 6). If the Victorian regime can hold power in its ability to repress sexuality, then there is always the dream that this repression can be broken, that power can be usurped. The “coming freedom” of utopia, sexual freedom, lies in breaking the repression our sexuality is kept under. Since that

repression is silence, speaking sex is the key to transcendence and the benefit of the speaker, is the glory in breaking from power.

In the process of speaking sex then, what is spoken is in the same moment a promise of transgression whilst categorising and governing sexuality. What is peculiar about this debate, is that it is so obviously caught in this double meaning of speaking sex. The legislation exists both to enable lesbian and gay sexuality, but also to contain this same sexuality within the boundaries of NSW law (and hence, common notions of norm and deviant as discussed in the previous chapter). This negotiation of a new (legal) truth then, is fraught with the contradictions arising from this double bind of meaning and results in an often times confusing process of statements and counter statements, story telling, moral lessons, facts supporting and facts denying.

The parliamentary debate represents what I call a journey of perversion between intent and actuality. It demonstrates how a political tactic of de-sexing the bill was paradoxically taken up into a process of speaking sex, and more importantly, speaking homosexuality into deviance (and heterosexuality into the norm). A lesbian outlaw analysis reveals that the silence of sex in the acquiescence narrative cannot be read simply as denial or acceptance of homosexuality or same sex relationships as it may suggest on the surface. Rather, the deviant being produced in the PRA is far from incidental or accidental, but, as this process demonstrates, a deliberate and necessary precondition for its passage through parliament.

5.3 Debating the *Property (Relationships) Act 1984 (NSW)*

Sexing the Bill: Narratives of Opposition and Support

The narratives of opposition and support within the parliamentary debate of the PRLAB are of a lesser volume than the narratives of acquiescence, discussed later in the chapter. They are, however, significant to the process of framing the Bill. The commonality of these two narratives lies in the overt consciousness that they demonstrate (in the majority) of the specific of sex contained within the PRLAB. That is, each narrative, for varying effect, speaks sex into the Bill (Chapter Two).

Three members⁸⁹ of parliament associated with conservative political parties voted against the PRLAB in the NSW Legislative Council (NSWLC).⁹⁰ Its passage through the NSW Legislative Assembly (NSWLA)⁹¹ was unopposed. Of the three parliamentarians who opposed the bill, only one spoke in debate, Reverend F.J. Nile, representing the Christian Democratic Party. Hence, the narrative of opposition consists solely of Nile's debate. Although this narrative is singular however, its significance should not be underestimated- it is both the longest speech within the debate of either House (approximately 37 minutes in length).⁹² Nile's is also the most disruptive speech, offering a movement for the adjournment of debate pending the outcome of a report by the Standing Committee on Social Issues into de facto relationships (NSWLC 25/05/99 at 317).⁹³ When it continues in committee, the narrative also offers disruption to the legislation through an amendment process. Nile structured his argument of opposition to the PRLAB in terms of morality. More precisely, he positioned the PRLAB as an abject corrupter of morality through its support of lesbian and gay relationships. Nile argued, "Clearly, if the Bill deals with the homosexual issue it deals also with moral issues" (NSWLC 25/05/99 at 312). Amidst parliament and other public debates, this link between moral corruption and the (deviant) body is common (Albury, 1999; Mulkay, 1997). It often serves to position the debate within religious connotations and makes the topic at hand somewhat 'unspeakable'. Morality is presented as an ultimate and apparently unwavering term and as such it supersedes any discussion of alternatives. In his debate Nile called upon 'expert' advice from a barrister. He said:

I have received a legal opinion from John Swan, barrister. I asked a number of lawyers to study the bill, and this is the first opinion I have received. He said that it sends the wrong message to the people of New South Wales (NSWLC 25/05/99 at 317).

This 'wrong message', given Nile's previous equation of morality and homosexuality runs something like this: homosexuality is morally wrong therefore legally sanctioning homosexuality through the PRLAB is the wrong message to give to obviously naïve

⁸⁹ These were: The Hon. John Saxon Tingle- Shooters Party
Rev. The Hon. Fred Nile- Christian Democratic Party
The Hon. David Ernest Mr Oldfield- One Nation

⁹⁰ The NSWLC is the Upper House of Parliament, a House of review, consisting of 42 members.

⁹¹ The NSWLA is the Lower House of Parliament. The Government of the State is made up of the majority of the 93 members in this House.

⁹² Arguably, this is longer still if the speeches in Committee are also considered. In Committee on 26 May 1999, Nile continued his narrative against the PRLAB for another approximately ten minutes.

⁹³ As discussed in the previous chapter, this was the fate of the "De Facto Relationships Amendment Bill 1998," which lapsed due to the lengthy time frame of reportage by the Committee.

citizens of the state. This attempt at silencing through morality was demonstrated again through Nile's attempt to adjourn the debate. Having read two statements from religious bodies (the Anglican and the Catholic Churches) Nile declared:

There is widespread concern in the community about the legislation... For that reason I move:

That this debate be now adjourned until after the standing committee on Social Issues has tabled its report into the de facto relationships legislation (NSWLC 25/05/99 at 317).

Although unsuccessful as an adjournment, Nile successfully radiates the moral panic about the PRLAB by drawing on a 'widespread' community represented through churches and other religious organisations. Through this moral positioning Nile was able to extend and support his opposition to the PRLAB.

The 'concern' expressed in Nile's debate is presumably one of moral disorder, a perceived result of the PRLAB. Through the specific of sex, we can understand the founding of this perception. A firm illustration of this awareness of constructing sexuality through the PRA can be also be found In Committee at the Legislative Council when amendments to the legislation were proposed by Nile. The eventuating amendment reads:

Nothing in the *Property (Relationships) Act 1999* is taken to approve, endorse or initiate any change in the marriage relationship, which by law must be between persons of the opposite sex, nor entitle any person to seek to adopt a child unless otherwise entitled to by law.

Although legally unnecessary, since the PRA is state based legislation and both marriage and adoption are federal jurisdictions, this amendment ensures the symbolic orientation of the PRA as heterosexually biased. Through this statement the PRA overtly prioritises heterosexual unions as worthy of greater social recognition and 'reward' and maintains homosexuality as deviant. This was again reinforced later in the expression of his concerns of the use of the word "spouse" in definitions of the PRLAB (NSWLC 26/05/99 at 396-8). Nile argued here that spouse had a very specific, heterosexually exclusive lineage and that its use in the PRLAB may confuse and eventually alter this understanding in terms of married spouses.⁹⁴ Although no amendment was consequential from this expression, what he fears is the same as the

⁹⁴ Nile argued of this confusion: "This legislation invites the use of the word spouse, which may create problems in the future. The bill legalises the use of that word. People organising functions might have difficulty in determining who will arrive at those functions" (NSWLC 26/05/99: 398).

possibility he foreshadows in the amendment above- that of gay men and lesbians threatening the boundaries of heterosexuality. This demonstrates both aspects of 'speaking sex'- an awareness that the construction of homosexuality is under review through the PRLAB and an overt conditioning of that construction within established patterns of norm and deviant sexuality. What the amendment proposes is ensuring is that 'nothing in the construction of the homosexual being through the PRA is taken to approve, endorse or initiate the norm of heterosexuality'. As Attorney General The Hon. J.W. Shaw argued, this amendment was "essentially redundant" (NSWLC 26/05/99 at 393) in a legal sense, since the definition of de facto relationship precludes marriage.⁹⁵ However, the apparent need to have this articulated regardless of its legal irrelevance points to an understanding of the PRLAB as something more than the conference of a set of liberal democratic rights and obligations- it points to the construction of homosexuality, or the specific of sex.

The deviant homosexual that Nile tries fervently to defend the community from shares remarkable characteristics with the lesbian outlaw subject position. Through the above amendment, Nile anticipates an other order to the heterosexual norm. He anticipates knowledges about relationships and about sexual ordering that displace those currently established through the legal system. He anticipates both the vulnerability of legal truth and the nature of discourse found in the lesbian outlaw (for example, multiplicity, agency and of course, homosexuality). Through the amendment Nile establishes the PRLAB as a barrier to this outlaw figure by reinforcing the heterosexual norm as a legal truth.

This anticipation of the outlaw through the specific of sex is also tangible in the narratives of support found within the debate. Support narratives within the PRLAB debate came unanimously from Greens and Democrat party members and some independents. Many support narratives also came from Labor⁹⁶ who introduced the bill. The narratives of support offered exclusive support for the entirety of the legislation.

⁹⁵ The PRA reads:

For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and
(b) who are not married to one another or related by family.

⁹⁶ At the time, NSW was under a Labor government whilst the Federal government was a Liberal/National coalition.

Indeed in many instances, these supporters made reference to the limited nature of the recognition that the bill offered to people in same sex relationships, and supported the possibility of further reaching legislation in the future. In these debates, the PRLAB is again a gatekeeper but this time, a gatekeeper to the type of freedom and liberation that Foucault characterises in his discussion of the speaker's benefit: the PRLAB is a temporary gatekeeper this time opening towards outlaw knowledge, towards transgression and 'other' ways of functioning.

Narratives of support usually contained overt labelling of the bill as being 'about' lesbians and gay men. The second reading speeches for example, in both the Legislative Council and the Legislative Assembly, spoke in clear language: "This redefinition of "de facto relationship" is designed to be clearly inclusive of those living together as homosexual couples." (Shaw, NSWLC 13/05/99 at 229; Whelan, NSWLA 26/05/99 at 534). From the outset then, the bill was obviously defined as being about (homo)sexuality. The utterances of 'gay', 'lesbian' and 'homosexual' within the narratives of support are significant indicators of the specific of sex in two key ways. The first is in relation to the relative silence of gay and lesbian relationships in the narratives of acquiescence as I have outlined above and that will be explored further below. The second and more pertinent point here is in relation to the framework of positive reinforcement in which the narrative of support places these references.

Ms Clover Moore (Independent Member for Bligh, NSWLA) was one of the most ardent supporters of the PRLAB and her part in the narrative of support for the bill is illustrative of both these indicators of the specific of sex. Her speech began: "I support this bill because lesbians and gay men for the most of this decade have been looking to this Parliament to provide basic human rights which the rest of us take for granted" (NSWLA 01/06/99 at 710). From the outset then, she articulated the legislation as being 'about' lesbians and gay men. This continued throughout her speech. Indeed, in her fifteen minute speech to parliament, Moore used the phrases "same sex" and "lesbians and gay men" a total of twenty times. This iteration is illustrative of the narratives of support in their attempt to speak sex almost in a frenzied response to the pervasive silence of the specific of sex in other speeches. In this case, the use of the labelling relating to the specific of sex is held in a Foucaultian framework of speaking sex to hold power, to direct the intent of the bill towards lesbians and gay men. More over, to direct

this hold of power against the other utterances of the specific of sex in the narrative of opposition where the negative connotations and deviant framing abound. Moore's framing of these two phrases is overtly positive and acts to normalise homosexuality. She continues from above: "Those people have been looking to the Parliament to recognise the simple fact that they form close and committed personal relationships; that they need and are entitled to have the protection of the law in times of crisis" (NSWLA 01/06/99 at 710). Lesbian and gay relationships are, in this framing, normal and non-threatening ("simple fact"). The liberal democratic rationale of rights is called upon to emphasise this normality with legal protection being forwarded as an entitlement presumably of citizenship within a human rights framework.

An understanding of the liberatory potential, which the narrative of support holds of the PRLAB, furthers the link of this narrative to the image of power that Foucault invokes as the speaker's benefit. This is found in both the statements of intent related to the PRLAB (examples of which are demonstrated in the quotes from Moore above) and in the comments made by many of the speakers of the limited nature of the bill, indicating the potential for further law reform. Moore, for example, concludes her speech by saying: "There is still more, much more, to be done." (NSWLA 01/06/99 at 713). Similarly, the Hon. I. Cohen (Greens Party, NSWLC) said of the bill:

We appreciate the long and torturous path to get the bill to the Parliament and hope that it will achieve bipartisan support today. We will not move amendments but I urge the Government to introduce amendments in the not too distant future to give adequate and appropriate equal rights to gay and lesbian people in New South Wales. Notwithstanding those minor shortcomings, the Greens happily and strongly support the passage of the bill (NSWLC 25/05/99 at 297).

Again, a liberal democratic framework is employed to articulate the vision of equality as the ultimate state for lesbians and gay men under NSW law. The speaker's benefit functions here exactly as Foucault has described it, to anticipate a coming freedom and to appear to break with the holds of power that keep homosexuality 'repressed'. As I have already discussed, the effect of such liberal democratic framing techniques is often times effective and in a political sense this is true of Cohen's speech which articulates particular political support for lesbians and gay men. However, the obvious limitations of the speaker's benefit is linked to the illusion of being able to break from power. Although Cohen's equality utopia is a legal possibility it is articulated in support of a

piece of legislation which reproduced existing power dynamics of heterosexual privilege (Chapter Four).

Claims such as Cohen's above indicate a promise of something more that the continuation of such sex chatter within the Parliament can bring about. Foucault's promise of bliss lies in the invocation of future law reform, in calls for equality and rights for lesbians and gay men. Following Foucault's equation then, when the relationships of lesbians and gay men are invoked in the narrative of support this is necessarily done so with the specific of sex at the fore. The anticipation of freedom held in this narrative makes sense only if the silence it is breaking is read as repression- in this case that repression is legal discrimination against homosexuality in the NSW legal system. The PRLAB speaks this possibility into being and heralds the gateway into freedom. Re-read in more Foucaultian terms, the PRLAB brings forth the possibility of other power/ knowledge arrangements to those currently supported by the legal system. In the narratives of support, the PRLAB anticipates lesbian outlaw discourse.

Both the narratives of support and opposition share the commonality of expression of the specific of sex contained within the PRLAB/ PRA. An outlaw analysis however, focuses too on the silences. The silence against which each of these narratives can be measured, is the treatment of the specific of sex within the narrative of acquiescent law reform.

De-sexing the Bill: Narratives of Acquiescent Law Reform

The third category of narrative discernable in the parliamentary debate surrounding the PRLAB, I characterise as a type of acquiescence. These narratives contained oppositional statements, but resulted in a practice of support for the legislation. The key difference between these narratives and the ones I have discussed above is found in the process of de-sexing the Bill. Within these narratives, the specific of sex is consciously un-spoken so as to maintain the Victorian type propriety that Foucault describes. The nature of this can be seen in the following example of debate "If this bill were about sexuality I would not be able to support it. However, as no-one is arguing that this bill is about sexuality, I will not oppose it" (O'Doherty, NSWLA 01/06/99 at 739).⁹⁷ I

⁹⁷ This quote, and further discussion on its importance can be found in Millbank and Sant (2000: 202).

characterise this type of statement as being indicative of a reverse speaker's benefit. That is, the speakers speak out the specific of sex so that the impending power schism that is due to result from speaking sex is averted. The extent to which the reverse speaker's benefit is successful is clearly on display. The speaker's position is framed by in opposition to homosexuality however since the impulse to speak sex is removed from the situation, the bill can receive support.

The most number of statements resistant to the legislation came from the Legislative Assembly where the bill was passed without opposition. The government had worked to gain bi-partisan support for its bill prior to its introduction, to ensure its passage through both houses of parliament. However, the nature of this support was often uttered with oppositional overtones. The phrase we/ I "do not oppose the bill" (Samios, Liberal Party, NSWLC at 295), gives more of a sense of acquiescence throughout the parliamentary debate, rather than a totalising sense of support the votes for and against may suggest. Given this refusal to support it overtly, and the various other negative statements made by politicians who stated they did not support the bill in its entirety but still did not vote against it, it appears that the majority of support for the legislation can be read as a type of acquiescence. The extent to which the term narrative of acquiescence is an accurate description can be ascertained by the degree to which it encompasses the narrative of opposition whilst still maintaining a practice of support for the bill.

The most obvious example of this can be found in the reprisal of the morality argument, particularly in the Legislative Assembly. Numerous speakers in this house articulated concerns that the PRLAB threatened moral boundaries, usually expressed in terms of the heterosexual nuclear family and its link to religion and God:

I oppose any legislation that in any way undermines the sanctity of marriage and the family unit (Souris, National Party, NSWLA 01/06/99 at 714; Page, National Party, NSWLA 01/06/99 at 738).

...I am a god fearing person who does not believe in homosexual relationships. I do not think that God intended us as a race to behave in that way. I am very disturbed that the bill will be regarded by the gay community and others as a step in that direction (Fraser, National Party, NSWLA 01/06/99 at 736-737).

It [the PRLAB] will affect what are considered to be normal marriages, reasonable morals and the good standards by which our community should abide (Smith, NSWLA 01/06/99 at 739-40).

Within these statements homosexuality (the specific of sex) is clearly the underlying prompt for the PRLAB and that this is read as a threat to morality. Moreover, it indicates that this religious morality is a fixed and determined social good in need of protection and defence. However, as more than one speaker indicated, since the bill was posed as primarily dealing with property, the process of acquiescence was facilitated through the obscuring of the moral element. The underlying moral concerns however, littered the debate even when there was no direct target. In some instances for example, the moral statements were made in isolation from the bill, in effect, simply articulating a moral position:

Marriage is designed to, and is held dear by the church to, ensure the proper raising of children. Within a family there needs to be a loving mother and father relationship to give children a balanced view of life that, I believe, God intended and Our Lord Jesus Christ would want us to perpetuate. (Glachan, NSWLA 01/06/99 at 740)

Here, the speaker calls on a traditional heterosexual image of the family unit and reinforces its social necessity through religious ideology. Its appearance in the parliamentary debate is curious given that the PRLAB did not change Commonwealth marriage laws and particularly so given the amendment already passed by Nile (discussed above) articulating this very fact. What it indicates is the extent to which the PRLAB was being read by speakers as having a specific of sex (hence the moral invocations against it) and the extent to which the property aspects of the bill were ensuring the acquiescence process.

I believe that the government deliberately tried to distance their bill from issues of lesbians and gay men in order to achieve this acquiescence of parliament. The intent was to de-radicalise the bill by de-sexing it. More overtly, it was to remove the lesbian and gay foundations of the legislation, making it palatable to a general audience. That is, the PRLAB had the specific of sex removed from it in a deliberate tactic to disengage lesbian outlaw discourse as a possibility. In the double play of this process of speaking sex outlined earlier, the silence of homosexuality in the parliamentary debate is paradoxically intended to allow its eventual articulation in law. However, this tactic, whilst tangibly successful in that the bill was passed, was perverted throughout the parliamentary debate in these narratives of acquiescence. Rather than ushering in the promised bliss, freedom and earthly delights, the PRA articulated in law relationships

that already existed and in the process reinforced established systems of norms and deviance surrounding sexuality.

The merit of such a claim is given weight when compared to the two previous bills- the "Significant Personal Relationships Bill 1997" and the "De Facto Relationships Amendment Bill 1998"- that had attempted similar types of reform in NSW parliament in the lead up to the passage of the PRLAB. Each of these bills was presented to parliament as specifically addressing the need for recognition for same sex relationships in NSW law. The Second Reading speeches of each bill gives indication of this. The Attorney General Jeff Shaw introduced the PRLAB to parliament and made only a singular reference to either homosexuality, same sex relationships or lesbians and gay men. He stated simply: "this redefinition of de facto relationship is designed to be clearly inclusive of those living together as homosexual couples." (Labor, NSWLC 13/05/99 at 229) Comparatively, Clover Moore, in introducing the "Significant Personal Relationships Bill 1997" made eleven such references (NSWLA 25/09/97 at 584-587),⁹⁸ and Elisabeth Kirkby, introducing the "De Facto Relationships Amendment Bill 1998" made thirteen such references (Democrats, NSWLC 24/06/98 at 6324-6328).⁹⁹ Kirkby also made specific reference to the NSW Gay and Lesbian Rights Lobby in her second reading speech, commending their involvement in the drafting of the Bill. The parliaments in such a comparison are, granted, consecutive ones¹⁰⁰ however, the in government was Labor in both instances. Similarly, this comparison is between Second Reading Speeches, where the purpose is identical in each instance- to frame the intent and purpose of the Bill. Regardless of the parliamentary makeup, there are marked and deliberate differences between these presentations of Bills, which ostensibly aimed to achieve the same outcome. The PRLAB, from the outset, was conspicuously de-sexed in its intent. What this section does is to track the process of this journey of perversion to demonstrate how the political tactic of de-sexing the bill was paradoxically taken up into a process of speaking sex, and more importantly, speaking homosexuality into deviance.

⁹⁸ This Bill lapsed without vote.

⁹⁹ The Second Reading Speech of this Bill occurred after nearly an hour of out of order debate on the merits, morals and intent of the proposed legislation, including a vote for and against the allowance of its introduction. One parliamentarian referred to this process as "the gag" (Corbett, A Better Future for Our Children Party, NSWLC 24/06/98 at 6321). This Bill was referred without debate to the Upper House Standing Committee on Social Issues.

¹⁰⁰ 51st Parliament for the SPRB and the DRAB; 52nd Parliament for the PRLAB.

Although the PRLAB received bi-partisan support, the parliamentary discussion does not reflect a simple process of agreement with the legislation. What it illustrates instead, is a conflict of tensions between support and opposition narratives. These narratives are complex, intertwined and often times, contradictory. A member of parliament for example, could speak against the bill, but vote in favour of its passage. Jose van Dyck suggests that public debates are commonly characterised by this complexity and using a Foucaultian framework argues that there is more to the debate than argument and counter argument. Van Dyck says:

There is not, on the one hand, a discourse of power and on the other hand, a discourse that runs counter to it. Mainstream and oppositional voices, discourses and counter discourses, exist conjuncturally, and are necessarily involved in a power struggle. They operate in the same field of tension, often deploying the same strategies and tactics (1995: 20).

In this debate, argument and counter argument can certainly be identified. However, the situation as van Dyck describes, is marked by more complex conflict. The most remarkable point of conflict in this “field of tension” lies in the dual purpose of the bill to confer legal rights on same sex couples and (although to a lesser extent) on carer relationships, most commonly characterised in the debate as the relationship between an elderly parent and daughter. The curious situation is generated where speakers do not fit into the dual categories of support for and opposition to the bill. There is in fact a third category which opposes the inclusion of same sex relationships in the definition of de facto, but supports the carer provisions of the bill. The conjunction of support and opposition that van Dyck describes is epitomised in this situation and forms a central theme to the analysis of the debate.

Narratives oppositional to the bill were not solely identified with those who voted against it. Many speakers opposed parts of the legislation whilst supporting others. Indeed, the highest number of statements resistant to the legislation came from the Legislative Assembly where the bill was passed without opposition. Opposition and support narratives merged in a complex and contradictory manner. Oppositional statements were countered by statements of support and vice versa:

I support those parts of the bill that make it easier for children who are carers to make claim on an estate in the event of intestacy...However, I oppose the elements of the bill that might have the consequence, intended or unintended, of giving a homosexual partner priority over a natural family in the event of intestacy (Souris, NSWLA 01/06/99 at 714).

National Member Souris's statement indicates a clear preference for legal heterosexual privilege. It draws on the sentiment of homosexual terror invoked by Nile in his oppositional narrative to denote this preference. The 'natural family'- the cornerstone of hetero-patriarchal ordering- is under threat in terms of legal entitlement by the deviant homosexual. Of course, unless the 'natural family' was a divorced partner- in which case any re-partnering homosexual or otherwise would supersede this relationship on the intestacy ladder- this is not a legal fact. Such is the strength of this terror aspect to the opposition of the bill however, that it emerges repeatedly in this nonsensical manner throughout the parliamentary debate. Such was the extent of conviction supporting this particular invocation that Souris called for the splitting of the bill so that the lines between opposition (to homosexuality) and support (for heterosexuality) could be more clearly demarcated. This image of the devious homosexual man reappeared throughout the debate. Smith for example expressed the concern:

Many provisions of this bill are worrying, in particular the rights that may be given to people in homosexual relationships. A man in a heterosexual relationship may decide to have a homosexual relationship. If that man dies, his homosexual partner has as much right to his estate as have his wife and children. That is not right (Smith, NSWLA 01/06/99 at 739-740).

Again, the PRLAB is read as taking rights away from the heterosexual nuclear family and the homosexual man is read as a threatening and callous figure.

In the majority of cases however, the debate made little problem of this conflict and contradiction. Indeed, as van Dyck suggests, the conjunction between the two arguments seems quite acceptable and comfortable. Similar to the situation described above, support narratives were not so clearly defined. The nature of support for the bill, particularly from the opposition party, was often uttered with oppositional overtones, hence the oft used phrase we/ I "do not oppose the bill" (Samios, NSWLC at 295) discussed above. This type of oppositional-voiced support manifested in a variety ways throughout both houses of parliament but was, without variation, directed at the characteristics of the bill that would recognise and enable lesbians and gay men. What this means in terms of Australian politics could be read in a number of ways. Perhaps it is illustrative of a society, which had turned the corner in attitude by decriminalising homosexuality, but was restless with the idea of taking any further steps towards actually legitimating the relationships of lesbians and gay men. In a democratic society the parliament must be seen to some extent as the barometer of the people who elected

them to represent their interests. Perhaps it is also a sign of the flux and resistance that any major change to the understanding of social ordering, by its very nature creates. Or perhaps, more simplistically, it is an indication of the efficiency of the government's lobbying to ensure the passage of the bill. In my opinion all are equally justifiable suppositions. However, the symbolism of the conjuncture between opposition and support is also important.

If we are to see this process as a negotiation then this may be explained as a situation of give and take. However, the situation is likely more complex than this. The negotiation is the production of truth and more poignantly, the production of sex. The symbolism of this act must be considered. The boundaries between norm and deviant are under threat when the negotiation process is taking place. Speaking other-than-heterosexual sex as deviant is crucial in maintaining the legitimacy of this divide, despite the fact that the boundaries are shifting. Thus the narratives speak sex as deviant to counter the fragility of the norm/ deviant divide which is highlighted in the action of supporting the bill.

This fragility of the norm/ deviant divide is evident as soon as sex is spoken. Foucault argues that "the mere fact that one is speaking about it has the appearance of a deliberate transgression. A person who holds forth in such language places himself (sic) to a certain extent outside the reach of power; he upsets established law..." (1980a: 6). Speaking sex then operates on two simultaneous levels- the incentive to speak sexuality in order to manage, and the incentive to speak in order to liberate. The latter incentive belongs to a Victorian rationality of sex and sexuality as repressed. The "speaker's benefit" (1980a: 6) as Foucault describes it is to overcome repression and hold one's self towards liberation. Certainly, laws have had repressive effects on lesbians and gay men in Australia and the effect of law reform is often times liberating. But the rationality of overcoming repression in this sense holds more threat to the Victorian order- to "upset", to 'transgress' and defy. Speaking sex "smacks of revolt" (1980a: 7) and this certainly does not go unnoticed when the parliament debates the PRLAB.

Speakers in opposition to the de facto provisions in the bill speak of a "political agenda" (Nile, NSWLC 25/05/99 at 315), an agenda set out to destroy "the sanctity of marriage and the family unit" (Souris, NSWLA 01/06/99 at 714). Speakers in support of the bill situate it as a stepping stone on the path towards lesbian and gay equality. The

continuity of this bill in a steady campaign to reform is established as speakers make reference to previous significant achievements such as decriminalisation and anti-discrimination laws, and the emphasis that “(t)here is more, much more, to be done” (Moore, NSWLA 01/06/99 at 713). Revolt however, is a difficult thing for which to gain bipartisan support. In what can be characterised as a reverse-speaker’s benefit then, there is an active de-sexing of the legislation. This process occurs across support and opposition narratives, in an attempt to make the legislation more palatable to the Victorian regime. The radical nature of the new truth being produced is downplayed in this way not only for the speakers in parliament but for the constituent audience.

There are many examples of the reverse speaker's benefit being employed to consciously de-sex the PRLAB. For example, in introducing the PRLAB to parliament, NSW Attorney General, the Hon. J.W. Shaw said:

...I remind honourable members that the primary purpose of the De Facto Relationships Act is to provide for the redistribution of property of a relationship on its breakdown...These provisions will now apply equally for the benefit of those in de facto relationships, regardless of sexual orientation, and those in close personal relationships, as provided for in this bill (NSWLC 13/05/99 at 230).

Given the scope of the legislation and the specific change of de facto definitions to include same sex couples, brought in by the PRA, this excerpt from the parliamentary debate seems to understate quite significantly the purpose and ambit of the bill. There are two primary points here which typify the reverse speaker’s benefit in action. The bill is described as dealing primarily with issues of property. Similarly, the application of the legislation is described as being “regardless of sexual orientation”. Both of these points raised by Shaw, act in a way to de-sex what is spoken, to remove the contentious issue of homosexuality from the field of debate. There is significance in the fact that this trend in the supportive narrative is introduced by the first speaker and continues throughout the entire debate, in both houses of parliament, and across political party lines. This is also significant because the first reading of a bill in parliament, frames and interprets the legislation prior to the start of debate. The PRLAB then, began life in a manner that consciously de-emphasised the issue of sex and sexuality through a focusing of the debate on property and through a speaking of sex in general rather than specific terms.

The reverse speaker's benefit can be found in a number of techniques employed by both those who spoke within the narratives of acquiescence and the narratives of support. One such technique was to absent the Bill from the catastrophic imaginings of conservative arguments. These catastrophic images ranged from the demise of the nuclear family (Page, NSWLA 01/06/99 at 738) to the privileging of homosexual affairs over heterosexual marriages (Smith, NSWLA 01/06/99 at 739), through to a situation of "reverse discrimination" where heterosexual couples would be legally discriminated against (Fraser, NSWLA 01/06/99 at 737)- all of which were supposedly potential effects brought about by the passage of the PRLAB. To counter these images, many speakers discussed the bill in terms of what it did not do- that is, it did not end the reign of the nuclear (heterosexual) family, and it did not confer different or special rights upon homosexual unions. Characteristically of this technique for example, Shaw said:

I shall highlight some of the types of personal relationship which are not included in the ambit of the bill. First, the bill does not attempt to provide for any form of marriage, this being a matter, by virtue of the Commonwealth Constitution on which a State may not validly make laws... (Shaw, NSWLA 13/05/99 at 229).

This statement indicates that same sex relationship laws in NSW will not lead to same sex marriage at the level of the Commonwealth. Shaw articulates the limited ambit of the bill and reinforces the heterosexist hierarchy of relationship. The effect is to contain the disruptive potential predicted within conservative responses to the PRLAB. It acts in accordance with the reverse speaker's benefit by de-radicalising the impact of the bill on the (hetero)sexual order of social and legal making.

A similar process can be found in the tone of many speakers who frame the proposed legislative changes as simply formalising an established legal practice of relationship recognition. The choice of wording in many speeches is conspicuous for this tone, examples of which can be found in both the Legislative Council:

The bill *merely recognises* the reality of life that many people, of the same sex, as well as different sexes, live together (Jones, NSWLC 25/05/99 at 298).

and

It is a *simple fact of life* that today people enter into all sorts of different types of relationships, and as a consequence we as legislators must have a process by which we can set a framework so that dispersion of any property pertaining to that relationship is made on a fair and equitable process (Macdonald, Labor Party, NSWLC 25/05/99 at 311).

and the Legislative Assembly:

I support the Bill because it is *sensible legislation* which recognises *the simple fact* that although relationships come in different shapes and forms, that does not affect the depth of commitment within the relationship (Nori, Labor Party, NSWLA 01/06/99 at 736).

and

The bill will *correct many anomalies* that have been pointed out over many years (Turner, National Party, NSWLA 01/06/99 at 741).

(emphasis added).

These repetitive calming language choices disarm the legislation by insinuating that the changes it will make are not only simple and sensible but are almost like ironing out creases in the legal system- fixing anomalies rather than instituting new ideas or procedures. The reverse speaker's benefit in this example plays down the coming utopia predicted by speaking sex and suggests the maintenance of the status quo.

The process of de-sexing the bill, ensuring its passage through acquiescence, is upheld and enabled through liberal democratic tools. In the majority of circumstances, support narratives deferred to a notion of human rights, or the discourse of equality. One parliamentarian described the Bill as "basic human rights legislation" (Moore, NSWLA 01/06/99 at 710) whilst another argued that the PRLAB remedied discrimination against lesbians and gay men that the United Nations *Universal Declaration of Human Rights* assured (Cohen, NSWLC 25/05/99 at 296). Equality and human rights help to articulate the debate in commonly understood terms, and defer to the core democratic notions of justice and egalitarianism. These notions are obviously designed as a persuasion technique by deferring to notions held commonly by the majority. In doing so however, the debate is deferred away from the actual issue at topic. Since lesbian and gay issues are not common to the majority of people, equality and human rights talk couches it in terms that are common. In doing so however, the essence of the discussion again changes focus. Lesbian and gay issues are rendered to the periphery by their very own persuasive technique.

Throughout the debate continual reference was made to the United Nations *Universal Declaration of Human Rights* as an ideal that the PRLAB was upholding. Such statements framed the bill in terms of liberal democratic practices of anti-discrimination

often times downplaying the importance of homosexuality in the PRLAB. For example, Saffin argued in the Legislative Council:

...it [the *Universal Declaration of Human Rights*] is a barometer of how we should act towards one another and afford each other our human rights...based on the fundamental principle that all are equal before the law, and, even more importantly, on the principle of the rule of law. The bill remedies previous law, which was cruel in its application to those who had lived together in loving and intimate relationships (Saffin, Labor Part, NSWLC 25/05/99 at 298).

Here, the speaker measures the impact of the PRLAB against human rights guarantees. She talks of principles, equality and rights, she even talks about loving and intimate relationships, but throughout her entire speech of support for the legislation, she makes no reference to homosexuality or same sex relationships. These are certainly implied through the liberal democratic framing of equality but are adequately masked in a near tautology of rights speech.

The success of this tactic is difficult to measure. The bill passed, however, it facilitates the process of acquiescence in doing so. It allows discussion and support by people who may not have been able to do so had they needed to articulate positive images of lesbians and gay men. It also couches lesbian and gay issues in the legislative discourse, within a positive and humanistic framework, which is situated against the image of the criminal homosexual from history. In deferring to a notion of human rights however, the specific gay and lesbian target of the legislation is, in effect, dampened in its vision. Indeed, the parliamentary debate is littered with references reasserting the gay and lesbian focus of the legislation, most often of times, from those in opposition to this part of the bill. The deferring to a human rights framework by those in favour of the legislation appears to be perceived as a silencing of lesbian and gay issues, which those in opposition need to vocalise in order for their protest to have context. Such is the extent to which the rights claims in this debate act to divert attention away from same sex relationships however, that the debate repeatedly speaks of "property rights" which, as Millbank and Sant discuss, is an uncommon legal phrase. They argue this led to a situation where "gay and lesbian people had relationships with their property rather than with each other, and that made it acceptable" (2000: 202).

One such example of this can be found in the speech of Mr Hartcher who emphasised the importance of the PRLAB to ensure the protection of property acquisitions in the case of a failed relationship. He argued:

This bill in one sense recognises that such relationships (homosexual relationships) can be, and often are, of a caring nature and that, accordingly, the property acquired in such a relationship should be protected... This legislation will is not opposed by the Coalition, as it recognises the property relationships that people have built up. The law has always worked on the basis that it is important to recognise people's property rights. Our law is founded on recognition of property rights... (Hartcher, Liberal Party, NSWLA 01/06/99 at 708-709).

In this description, the PRLAB has an almost economic rationalist base rather than liberal democratic ideals such as human rights and justice espoused by people in the narratives of acquiescence. The speaker equates the (sometime!) care found in same sex relationships with property acquisition as if the two were necessarily connected and then proceeds to frame his discussion of the relationships covered by the PRLAB as if they were solely based on common property ownership. This framing acts to de-sex the bill by insinuating this basis and in doing so highlights the process of perversion I discussed earlier between the original intent of the bill (to legally enable lesbians and gay men) and its parliamentary interpretation.

Rights claims, as a political tactic, has its merit. However, these are often employed in a rigid fashion that avoids or precludes, the discussion of conflicting notions and plural options (see Chapter One). The PRA gave tangible rights to lesbians and gay men, and the use of rights claims in the parliamentary debate, in part, gave assurance that they would pass into being. However, rights claims also acted as an avoidance tactic, giving parliamentarians leave to remove homosexuality from the Bill. This avoids two important sites of conflict. It avoids the conflict between definitions of sexuality, which is essentially a distraction from the shifting margin of liberty. Sexuality becomes one factor on a list of inclusive options under the banner of 'human rights'. In doing so, the process of rights claiming becomes problematic. As Kingdom has suggested, the rights claims process, may well obscure an analysis of the system, which underpins the level of its own success and failure (1991: 83). Rights claims may be seen in this case, as making superficial change without addressing the fundamental system that governs the outcome, in this case, heterosexism. Rights claims also avoid the conflict between Victorian and proliferation type images of speaking sex. The apparent irreconcilable

nature of these two does not necessarily need resolution in order that the Bill be passed, because the sex of the Bill is removed, again, replaced with the more benign notion of 'human rights'. What this avoids however, is a forthright interrogation of the 'willingly imagined Victorian regime' that holds sex in the private and sexuality in its binary categorisations.

As was pointed out by several parliamentarians, the bill was given a decidedly neutral title that did not fully reflect the purpose of the bill. Certainly, the bill dealt with issues of property division, but this was not the only or indeed, even the primary function of the bill. The PRLAB was put to parliament and the most obvious function was to remove the gender binding description of relationship from the *De Facto Relationships Act 1984 (NSW)*. In essence, the bill was most overtly designed to allow the inclusion of same sex couples within the ambit of this legislation. And yet, the property focus from the name does not give any overt indication of this. Although parliamentarians had the full bill in front of them whilst debating the legislation, the neutral property title was used by many to give themselves permission to support the bill without overtly having to support or even discuss homosexuality.

Following this theme of euphemisms in parliamentary speeches as a diverting tactic from the specific of sex contained in the PRLAB comes the phrase "regardless of sexual orientation." Numerous parliamentarians, throughout the debate in both houses, used this phrase to describe the applicability of the PRLAB. This phrase opens up discussion and appears to be an inclusive statement. However, this phrase is also a successful silencing tactic, a way to avoid or to silence the words 'lesbian' and 'gay'. The links between liberal democratic ideologies and silence are again made visible in this situation. This type of phrasing is found in claims to equality such as the *Universal Declaration of Human Rights* which guarantees rights "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (Article 2 available online at <<http://www.un.org/rights/50/decla.htm>>). There are direct purposes to and achievements resultant from such notions. Millbank and Sant for example, suggest that "(t)he Government's discursive strategy of constantly naming the Bill as 'about Property' and not 'about sexuality' or 'about marriage' seemed to have an almost hypnotic effect" (2000: 202). It led to a decided lack of debate as to whether lesbians

and gay men should or should not be included in de facto legislation, and potentially enables its passage through parliament if O'Doherty's example above is indicative of a greater trend of acquiescence. However, such phrasing does not account for the ways other to this that homosexuality (or any other minority type grouping such as is found in the Declaration above) is written specifically into laws and legal systems as deviant (rather than discriminatory). Therefore, such framing does not give an accurate account of the effect to the PRLAB.

A third de-sexing technique can also be found in the Attorney General's introduction of the PRLAB to parliament. He says of the carer provisions in the bill: "the type of relationship which could easily be regarded as coming within the ambit of the bill is that which might exist between a daughter and elderly parent residing together for the purpose of obtaining and giving domestic support and personal care." (Shaw NSWLC 13/05/99 at 229) As has been demonstrated in other examples, this image of the carer and (her) dependent was taken by many speakers to epitomise worthy and wholesome relationships and were read using heterosexual assumptions (such as this parenting arrangement). Statistically, a third of the amendments were designed to recognise people in "close personal relationships" and yet it was by far the most consistent image of the legislation presented throughout the debate. The carer provisions within the bill, did not receive any negative or oppositional comment, indeed, fifty percent of speakers referred to the positive benefits the legislation would have for people in this dependent/caring situation. This was even though, as Millbank and Sant discuss, the carer provisions as presented in parliament between parents and children, curiously dealt with provisions that intestacy laws already took into consideration prior to the PRA (2000: 204). This being the case, it is obvious that the main purpose of such exaltations is symbolic. Through such framing techniques, the PRLAB is read with a strange concoction of heterosexual enablement at the fore and a firm preference for the support of sexless relationships.

Other similar hypothetical relationships that would benefit from this new legislation were put forward in various debates, further emphasising the desire to imagine the Bill as sexless. One speaker for example, clarified that it would "not be necessary for the parties to have a sexual relationship, merely a relationship of caring" (Hartcher, NSWLA 01/06/99 at 708) to be considered under the amendments offered by the

PRLAB. More telling of the extent of this will to read the Bill as sexless was the following scenario given to parliament which successfully combined asexual relationships and religion, sure to make the Bill palatable to any audience:

The example could be given of two female deacons who are living together to support each other, who have a joint interest in property, and in whose relationship there is no sexual element. This bill would recognise the contributions of each. That is an area in which the law needed to provide a degree of recognition and a degree of access to justice (Kerr, Liberal Party, NSWLA 01/06/99 at 742).

In this example, Kerr takes two religious figures (the deaconesses) and creates a caring relationship between them marked by property ownership. The speaker gives the scenario morally acceptable overtones through religious imagery and through more overt statements that the relationship is indeed platonic. This obscure example of where justice needed to be employed can be read against the more general claims to justice, rights and equality that other speakers claimed for people in same sex relationships. This example, perhaps better than any, illustrates the pervasive nature of the de-sexing tactic. Whilst Millbank and Sant argue that this was a deliberate tactic on behalf of the government to gain opposition support for the bill (2000: 202), there is also a strong symbolism in this act. The Bill is fitted into acceptable notions of sexual binaries effectively making the bill about heterosexual, familial relations- if not through action then at least through intent and reputation. The dangerous, radical, destabilising potential of the Bill is turned on its head to support the status quo.

The pervasiveness of this tactic of de-sexing however, is not entire, and where lesbians and gay men are read with the threat of the speaker's benefit, there ensues a distinct moral debate. There were, for example, statements of opposition to recognising same sex relationships accompanied by suggestions that they were "not right" (Smith, NSWLA 01/06/99 at 739) and that this moral stance was supported by "the vast majority" of the community (Fraser, National Party, NSWLA 01/06/99 at 736). The opposition to homosexuality however, manifested itself in a less overt manner as well through the promotion of the ideal of marriage. Indeed, the carer provisions, as will be discussed below, were formulated by some parliamentarians, as an ideal relationship type against which homosexual relationships could be negatively compared.

This feature of the debate is noteworthy not simply in terms of opposition to the bill, but more generally in terms of the speaking of sexuality through the deployment of norm

and deviant categories. As might be expected, marriage in oppositional discourse, was spoken of in terms of its sanctity and its ideal as the pinnacle of relationship recognition. However, this discourse did not develop simply in support of marriage as the norm, it simultaneously spoke homosexuality into a deviant category. There were statements of opposition to the recognition of same sex relationships in place of marriage or in relation to the adoption of children. This oppositional discourse spoke with a traditional and pseudo if not overt Christian voice, which upheld marriage as the ideal unit for the raising of children. The most notable character of this series of oppositional statements is that, more often than not, they did not relate directly to the bill. Both marriage and adoption are maintained under federal laws and as noted by more than one speaker, the bill being debated had no direct correlative effect in this arena of politics. In the second instance, homosexuality was spoken into deviance through a more sinister and menacing characterising of gay men. These narratives spoke of the fear that the PRLAB would somehow endorse or directly lead to gay-marriage and the adoption of children by same sex partners. This series of statements then, need to be read in a manner other than material. In articulating these moral standards, the opposition narratives are foreshadowing the danger of this particular process of speaking sex described above. What is morally right must be articulated to counter the destabilisation and to articulate the reasons (homo)sexuality needs to remain repressed.

The productive nature of speaking sex is also on display in this morality debate. In this instance, homosexuality is spoken into deviance through a sinister and menacing characterising of gay men specifically, and homosexuality more generally. This hypothetical situation, put to the parliament illustrates this type of deviant creation:

Mr D. I. PAGE: ...Under the current law, if a married man with children separates from his wife and family and establishes a homosexual relationship of two years or more duration with another man and then dies intestate, the homosexual partner would have a claim on the estate only if he could show he was dependent on his partner. However, this legislation removes the need to show dependence. The implication is that under this legislation the homosexual partner, who may be quite wealthy, could make a legitimate claim on the estate of the father of the children... This legislation attacks that fundamental tenet and could leave the children in the circumstances I have described much worse off... (NSWLA, National Party, 01/06/99 at 738).

Page frames the scenario in terms of a heterosexual norm (the original mother and father) and an 'other' arrangement (the gay couple). Further, the speaker frames his argument so that children are represented as in opposition to a (potential) gay step-

father. Then, drawing on (an unconvincing) stereotype of gay men, the same-sex partner is represented as unable to make compassionate decisions about children. Not only is marriage the ideal norm in this speaking of sexuality, but one which is under threat from the deviant homosexual (Millbank and Sant, 2000: 204-5). This production of the norm/deviant divide was also played out through the carer narrative. It was often used as a marker of the good, moral society. Relationships characterised by selflessness and caring were depicted as worthy of government recognition and support. These were formulated by some parliamentarians, as an ideal relationship type against which homosexual relationships could be negatively compared. The intent of the legislation appears irreconcilable, almost oxymoronic with the repression of homosexuality, but through the carer narrative, the heterosexual-as-norm, homosexual-as-deviant praxis is sustained and nurtured. As discussed in the previous chapter, the same preservation/production of this praxis is apparent in the actuality of the legislation which sets up another more physical hierarchy of recognition, protection and privilege between heterosexual and same sex relationships.

In the Legislative Assembly, one parliamentarian's recounted tale returned most obviously to Nile's impulse to moralise about sexuality. As an example, it also illustrates the extent to which the Bill was read (whether overtly or not) as being about 'sexuality' rather than relationships, property rights or indeed any other variation of legalistic lingo. National Party Member Mr Fraser recalled:

A cousin of mine committed suicide over a relationship that he formed when he was a very young lad in a church situation. I suggest that that young fellow was pushed into a homosexual relationship and in the end he was not sure of his sexuality. That is sad (NSWLA 01/06/99 at 737).

Fraser uses an emotional story to sway sympathy towards his perspective. A young boy committing suicide has tragic overtones and elicits a sense of futility at the needless death. The speaker also relies on a connection to be made too, between this incident and the widely recognised large number of gay youth suicides in Australia.¹⁰¹ The intent then is to take the individual circumstance and make a more generalised negative connection between homosexuality and youth suicide. The story told by Fraser is indeed

¹⁰¹ Jacqui Griffin (1997: 107) quotes a study by V. Barbeler (*The Young Lesbian Report* (1992) Young Lesbian Support Group: Sydney) that found one in three lesbian and gay identifying young people had attempted suicide.

sad. What is also sad however is that in this scenario the tragedy is somehow caused by the reoccurring image of the demonised homosexual deviant. The homosexual who will steal money from innocent children and deserted wives, the covert paedophile praying on young, impressionable boys. And yet, despite the moral outrage that must accompany homosexuality if Mr Fraser's tale is to have purpose, he, and so many other parliamentarians who equally disapproved of, did not believe in or bemoaned homosexuality, did not vote against the Bill.

Such was the pervasive nature of acquiescence towards this Bill. Morality certainly incited this parliamentarian to speak sex in public, but it was for the greater good, as Foucault would have it, of administering it. The acquiescence, I would argue, comes from the acknowledgement that the bill was administering homosexuality in a manner that was broadly acceptable. The PRLAB was overtly acknowledged as having boundaries- marriage and adoption laws were maintained as exclusively the domain of heterosexuality. The lesbian outlaw subject position, or at least the characteristics of the lesbian outlaw that destabilise legal truths are held at bay through these boundaries.

The project of acquiescence, originally introduced to ensure the successful passage of the bill was tangibly successful. The PRA came into being. However, this process, throughout both houses of parliament, is perverted through narratives of opposition to homosexuality. What the debate formulates in this instance is a deviant homosexual at the centre of the legislation. The passage of the Bill is acquiesced primarily because this figure is not threatened in any tangible way by the legal amendments it would make.

5.4 Conclusion

The chapter has considered situations which highlight the double meaning of speaking sex as it played out in the parliamentary debate of the PRLAB. It has examined the narrative of support for the legislation, and in particular, the ways in which sex and sexuality were spoken out of the legislation in an attempt to present the bill as other than contentious. It has also examined the narrative of opposition to the legislation, reviewing the use of morality to present heterosexuality as the marker of decency and legitimacy. In each of these cases, sexuality is spoken (or consciously unspoken) with marked vulnerability, caught in the tension between the double bind of speaking sex.

The parliamentary debate surrounding the PRLAB is an overt illustration of speaking sex. Although the process of acquiescence achieved the passage of the PRLAB, so too did it act to contain homosexuality within the boundaries of deviance in parliamentary narrative, at both the symbolic and at the legislative levels. Heterosexuality on the other hand, is rendered asexual (deaconesses sharing property, brothers sharing a farm, daughters aiding and their ailing fathers) in the first instance, and virtuous in the second through a measure against the deviant homosexual. Although the PRA legally enabled lesbians and gay men, it did not alter the basic praxis of norm/ deviant, which keeps the lesbian outlaw at bay. In the next chapter I will continue this argument through an examination of the other major forum in which the Bill and Act were narrated: the media.

Chapter Six

Silence in Chatter: A Media Analysis

"I think maybe I could do something to help you," she recalls saying. "I have a voice now- people seem to want to hear what I have to say." (Judy Shepherd in Cullen, 1999)¹⁰²

6.1 Introduction

The chapter continues the examination of the *Property (Relationships) Act 1984 (NSW)* and its interpretation through liberal democratic discourse. The principle aim is again, to examine the function of silence in facilitating the production of this type of truth. Continuing the argument from the previous chapter I will argue that the PRA was developed through liberal democratic discourse where silence functions to obscure the margin of liberty and lesbian outlaw discourse. Ultimately silence is characterised as an enabler of the liberal democratic interpretation because it eclipses or allows the avoidance of the contradiction that necessarily accompanies such rationalities. However, the silence found in this presentation of 'truth' also has a second function which is to maintain the integrity of the project of governmentality that the PRA may otherwise, through exposing lesbian outlaw discourse, bring into question.

The PRA was interpreted in the media through a liberal democratic framework that ensured its banal and uncontroversial presentation. As an examination of two key Australian newspapers will indicate, media representations of issues involving lesbians and gay men most often contain some element of contention. Ultimately this threat can be read as the potential for a public issue to destabilise the heterosexual/ homosexual binary. Put another way, the threat is that the given issue may normalise homosexuality. When the PRA is interpreted in the media however, any potential threat to governmentality that the PRA may pose is silenced through its couching in liberal

¹⁰² Judy Shepard is the mother of Matthew Shepard, a 21 year old student murdered in a torturous anti-gay hate crime in Laramie, Wyoming on 7 October 1998. Since Matthew's death, Judy Shepard has used her son's story to raise awareness of hate crimes, particularly through media campaigns and speaking tours.

democratic terms. Correspondingly, the PRA is interpreted as maintaining the integrity of the governmentality project.

The chapter first examines the "Acts of Passion" advertising campaign promoting the passage of the PRA. The PRA was deliberately presented to a lesbian and gay audience, as being able to confer greater liberties than it was capable of, speaking in terms of "equality". Acting in the same manner as the narratives of support in the previous chapter, this process anticipates the lesbian outlaw through the speaker's benefit. The notion of equality being presented, and the notion of equality which liberal democratic rationalities must necessarily use then, is incremental. This in itself is a term of contradiction. However, in this specific instance equality acts to silence the contradiction. Silence from the mainstream press also allows the inadequacies of liberal democratic interpretations to survive whilst simultaneously highlighting these inadequacies. In light of this, the chapter argues that the outlaw standpoint better reflects the actuality of the PRA. It also argues that Foucaultian outlaw theory therefore offers a better system of deconstruction and more adequate tools of articulation for legislation dealing specifically with lesbians and gay men than do liberal democratic rationalities.

6.2 Methodology

The chapter conducts a media analysis on a number source types. It examines three primary media responses to the PRA. The first response is the "Acts of Passion" advertising campaign, a media/ poster campaign designed by the NSW Attorney General's Office to raise awareness of the new Act. The second response is NSW queer media's (*Sydney Star Observer* and *Lesbians on the Loose*) coverage of the passage of the PRA. The third response is contained in mainstream newspaper media (*Sydney Morning Herald* and *The Australian*).

The previous two chapters have established a theme of negotiating truth through the production and interpretation of the PRA. In this chapter I continue that idea by invoking a particular image of the media as discursive bearers of public debate and dialogue. As a precursor to this discussion, an understanding of homosexuality within

the public sphere must be articulated since the public sphere is the field within which mainstream media is located. Chris Brickell argues that:

A public/ private dualism is central to the liberal tradition of thought... the public represents a 'rational' and political world of work and decision making, whereas the private is identified with the family, intimacy and emotion...(a)s a result, 'the private sphere' is said to be devoid of politics (2000: 165).

It has been argued that the increasing social acceptability of homosexuality has been facilitated through its privatisation. That is, tolerance has been accorded on the proviso that homosexuality remain a 'private' affair. It has come, some have argued, at the expense of homosexual visibility within the public sphere (Carabine, 1995: 97; Barid, 1998: 205; Mason, 1995). There is then, a particular silence that is necessitated when lesbian and gay issues and media discourse interact.

This silence is not however, a silence of homosexuality itself, but rather, a pervasive silence of homosexuality as a norm. Todd Gitlin argues that within the media, particular frames are employed to organise information and to facilitate the interpretation of images (1980: 7). My contestation is that the primary media frame employed in relation to lesbian and gay issues in Australia is one of heterosexism. Within the public sphere, media performs two key functions- as a discursive space and as a site of public debate. As discourse, mainstream media constructs particular power relations. Brickell argues:

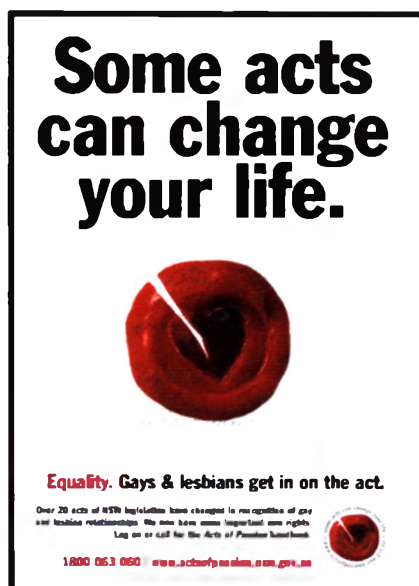
Media texts construct and reproduce discourse on the social order, often in ways that are aligned with relations of domination in a given society. They do this by privileging dominant accounts of the world as commonsensical and reinforcing distinctions between 'norm' and 'deviance'... lesbian and gay identities are contained through the erection and maintenance of boundaries of acceptability and through controls on the representations that are permitted and those that are prohibited (2000: 164).

Brickell's contestation is that mainstream media systematically and discursively constructs deviant categories for lesbians and gay men through the regulation of representation. Comments on the trends of heterosexism and homophobia within the public sphere and more specifically within mainstream media are widespread (Cahill, 1999; Smith and Windes, 1999; Brickell, 2000). Jose van Dyck argues: "Public meanings are concurrently constituted in and outside media, in science, politics, popular culture, films, law, and so forth." (1995: 18) Public debate is the dialogue between these discourses in power/ knowledge relations (1995: 19). In the chapter I will examine the particular ways in which the media constructs power/ knowledge relationships with the PRA through an analysis of textual reference and imagery.

6.3 "Acts of Passion": The PRA Advertising Campaign

Almost a year and a half after the passage of the PRA the NSW government released an advertising campaign to promote the existence of the legislation. In November 2000, the "Acts of Passion" advertising campaign was launched by the NSW Attorney General's Department, in association with the Gay and Lesbian Rights Lobby, the Inner City Legal Centre (Leichardt), the AIDS Council of NSW and a group known as the NSW Young Lawyers (<<http://www.actsofpassion.nsw.gov.au>>).

Fig. 6.1 "Acts of Passion" Advertising campaign



<www.actsofpassion.nsw.gov.au>

The campaign was designed to publicise the passage of the PRA and to highlight its relevance to a specifically lesbian and gay audience. The campaign focussed on two slogans: "From outlaws to in-laws." and "Some acts can change your life." Each followed by the statement: "Equality. Gays and lesbians get in on the act." The campaign comprised of a series of posters the majority of which featured photographs of long term gay or lesbian couples (Figs. 6.1 & 6.2).

Fig. 6.2 “Acts of Passion” Advertising campaign



<www.actsofpassion.nsw.gov.au>

These were accompanied by a free booklet entitled “Acts of passion: Lesbians, gay men and the law”, and a corresponding website, linked to the Attorney General’s page, which facilitated the downloading of both the posters and the booklet. The campaign material was made available at a series of public events, most of which coincided with the 2001 Sydney Gay and Lesbian Mardi Gras. These public events included

discussions, forums, a Mardi Gras float, and a stall at the (then) Sydney Gay and Lesbian Mardi Gras Fair Day.¹⁰³

The "Acts of Passion" campaign came out of the NSW Attorney General's Department. In this section, I will draw comparisons between the readings of the PRA offered in this governmental discourse with another governmental discourse reading of the PRA offered in the parliamentary discourse discussed in the previous chapter. Striking in this comparison is the way in which the PRA moves from a non-sex-specific piece of property law to a same sex-specific piece of relationship law. Take for example, two descriptions of the PRA offered in these contexts by the respective Attorney Generals:

The Property (Relationships) Legislation Amendment Bill recognises that contemporary society has developed to the point where laws that regulate the division of property on the failure of a broad range of intimate relationships are necessary and desirable (Shaw, NSWLC13/05/99 at 228-229).

and:

In 1999 the NSW Government introduced some of the best legal protections available in the world for gay and lesbian couples. (Debus, 2000, "Acts of Passion").

A comparison of the PRA as it appears in the parliamentary debates to the PRA as it appears in this advertising campaign could result in a good deal of confusion. The two discourses almost appear to be representing different pieces of legislation. In the previous chapter I demonstrated the ways in which narratives of acquiescent law reform, which formulated the bulk of the parliamentary discussions of the PRLAB, acted in a way to de-sex the bill. Conversely, in the advertising campaign, the PRA is presented as consciously and directly targeted towards the enablement of lesbians and gay men. In this interpretation the legislation becomes 'about' same sex relationships. This stands in stark contrast to the avoidance tactics used in the parliamentary debate to delineate the PRA from same sex relationships.

The "Acts of Passion" campaign forms another strand in the chatter of sexuality that prompts the negotiation of truth surrounding the PRA. This is significant for a number of reasons. The most obvious of these is the focus of the campaign on same sex couples. In the previous chapter I argued that one of the primary discourses found in the

¹⁰³ This is an annual event within the month long festival of the Sydney Gay and Lesbian Mardi Gras (now known as New Mardi Gras) held in February/March.

parliamentary debate was one of Acquiescence, characterised by an articulation against homosexuality but a practice of voting for the PRLAB. To recall one of these speeches within the Legislative Assembly: "If this bill were about sexuality I would not be able to support it. However, as no-one is arguing that this bill is about sexuality, I will not oppose it" (O'Doherty, NSWLA 01/06/99 at 739). When the PRA is read through the Government advertising campaign however, there is no doubt that "this bill" is precisely "about sexuality". To make the direct comparison, when the PRA enters the media, 'Daughter and her Ailing Father' (predominant characters in the parliamentary debate) give way to 'Aniek, Dawn and Lady' (Poster 1, *Fig. 6.2*)- cohabiting, smiling, same sex long-termers raising their dogs (but not their children). In this interpretation the legislation becomes 'about' same sex relationships, standing in stark contrast to the avoidance tactics used in the parliamentary debate to delineate the PRA *from* same sex relationships.

The second key reason that this media representation of the PRA can be read as sex chatter is found in the title of the campaign- "Acts of Passion". The nuances in this are obvious. Throughout Australian history homosexuality has been commonly made synonymous with sex. This is evident on a number levels- the assumptions of paedophilia made of gay men in the press and in the court room; court decisions that have banned displays of 'lesbian' affection in front of children; sodomy and buggery laws that have been used to veto the formation and meeting of gay and lesbian political and support organisations and so the list continues. In this light, the "Acts of passion" campaign summonses these connections. This in itself is perhaps a flimsy argument to correlate the campaign with sex chatter, although not an illegitimate one. The connections between homosexuality and 'sex' are evident in current popular culture, media reports and legal systems in Australia. The strength of this argument however, comes with the addition of a comparison of the descriptions of the PRA again found in the parliamentary discussion and this campaign. In his opening speech to introduce the PRLAB in parliament, the NSW Attorney General Jeff Shaw argued that the "primary purpose" of the Act was "to provide for the redistribution of property" (NSWLC 13/05/99 at 230). Some twelve months later, the PRA is presented through this same political location, as an Act of 'passion'. The campaign makes primary reference then, to the relationships that it is held to cover, not the property that in parliament it was held

to protect. In this particular discourse, the PRA is being overtly read as about same sex relationships and is therefore a discourse of sex chatter.

This is in line with my other descriptions of the negotiation of truth. There is however, a marked difference between the truths articulated in the "Acts of Passion" advertising campaign and the other two discourses of speaking sex analysed in previous chapters and that is the specific of sex that is overt. The advertising campaign is consciously and overtly referencing homosexuality, which has been a conspicuous silence in the other discourses already analysed. Despite this however, the campaign fits within the same pattern of liberal democracy that I have previously discussed, where silence is used to obscure the contradictions inherent in the PRA. In this particular instance, the silence is used not to mask homosexuality itself, but to mask the contradictions that arise from the attempt at a liberal democratic interpretation of what is in essence a governmentality project (the PRA). The campaign sets out to present a group of limited, curtailed and conditional legislative amendments to a lesbian and gay audience. The "Acts of Passion" campaign speaks boldly in the language of half truths and obscured realities that characterises the process of the legislative reform. I do not contend that an advertising campaign should be read literally. I focus on this campaign, not because it is any more an integral piece in the process of negotiating this new truth, than the other areas I have already examined, but because its symbolism is so very stark. It speaks directly to a lesbian and gay audience with a simultaneous sense of achievement, promise, and the quelling of discontent.

The transference of silence then, in this particular case, is not located within the articulation of homosexuality but as in the narratives of support, lie more directly in the articulation of liberal democracy. The narratives of support, examined in the previous chapter, often argued that the PRLAB did not go far enough in terms of enabling lesbians and gay men within the legal system. Paradoxically, the same narratives spoke the PRLAB into being through liberal democratic markers such as equality, rights and justice. In these instances, silencing tactics (such as the refusal to debate the PRLAB's limitations) functioned to ease the contradictions inherent in this framing of the legislation. The same functioning of silence is apparent in the advertising campaign for the PRA. Although homosexuality is overt in this interpretation of the campaign, what are silenced are the shortcomings of the legislation, the limitations of scope and

protection. Somewhat interestingly, this silence is facilitated through talk. The advertising campaign talks boldly of 'equality' despite the obvious inconsistency between common understandings of this concept and the piece-meal actuality of the PRA.

The liberal democratic framing technique, in this interpretation of the PRA, moves from a predominant focus on rights found in the parliamentary debate to a predominant focus on equality. I want to examine this notion of equality that the campaign uses, or more precisely given the limited ambit of the legislation, the notion of incremental equality that it obviously speaks of. The notion of equality underpins the democratic functioning of Australia.¹⁰⁴ At the everyday level, equality infiltrates common understandings. Given these reference points, it is hardly surprising then, that struggles for lesbian and gay visibility, protection and acceptance, commonly defer to the discourse of equality (Willett, 2000: 248). Equality positions the debate and articulates the issues in a language of common understanding. This is readily identified in the advertising campaign. Equality is used to speak of the function and intent of, what was at the time, a relatively new piece of legislation, to an overtly intended lesbian and gay audience. With this in mind then, the use of equality in the specific case at hand, is also serving a more primary purpose- interpreting the PRA in the public sphere and in doing so, presenting a way of knowing lesbians and gay men under these new conditions. The PRA did not institute equality of treatment between same sex and heterosexual relationships within the NSW legislative system and the parliamentary debate surrounding the PRA specifically acted to ensure this inequality was maintained. Given this, it is curious to find such an overt interpretation of the legislation as equality when it enters the public sphere through this advertising campaign.

Equality has little room for misinterpretation or nuance although when used as it is in the advertising campaign to denote a process of incremental rights gathering, more grey space opens up in the term. Rights on the other hand, are more fluid and, as discussed in the previous chapter, are open to processes of counter claiming. This was integral to the

¹⁰⁴ As a signatory to the United Nations Universal Declaration of Human Rights, Australia has committed to the notion of equality, which permeates this statement. Article 1 of the Declaration reads: "All human beings are born free and equal in dignity and rights..." and article 7 "All are equal before the law and are entitled without any discrimination to equal protection of the law..." (<<http://www.un.org/Overview/rights.html>>).

previous liberal democratic interpretation of the PRA. The rights that the PRA accorded were articulated as specifically limited by all sides of the parliamentary debate. This served to de-radicalise the Act and ensured its passage through parliament. Somewhat confusingly then, this rights based interpretation worked specifically because it could frame the legislation in terms of inequality. The government sponsored media campaign then, interprets the PRA as equality. This contradicts the government's own prior interpretation as well as contradicting the actuality of the legislation.

Feminist discussions of equality have highlighted two key approaches to equality- based on sameness and difference (Chapter One). If two identical glasses are filled with water and the levels are not the same, then their volumes are not equal. This is a measure based on sameness. They may be equally able to quench a thirst, a measure of equality which incorporates their difference, but they are not the same. The PRA appears to have been interpreted through the first notion of equality as sameness. There are two major reasons for suggesting this. First, the recognition that the PRA accords, is a definitional extension of the heterosexual de facto couple. Same sex relationships are assumed to fit into this category based on an essential sameness. More than this however, difference marks same sex relationships as distinctly unequal in law. Because same sex relationships are not heterosexual relationships, they are treated differentially in provisions outside of the PRA. Given this, the notion of equality that this liberal democratic interpretation uses is based on the sameness approach.

Equality, based on a notion of an essential sameness, is core to legal codes, underpinning both grand narratives (such as the *Universal Declaration of Human Rights*) and micro narratives (such as anti-discrimination legislation). Equality before the law however, is conditioned by a sense of essentialism. In the *Declaration* for example, Article 2 writes the condition of equality *regardless* of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (<<http://www.un.org/Overview/rights.html>>). Under this notion, lesbians and gay men are included in law 'regardless' of their sexuality. However, conversely (and somewhat perversely), lesbians and gay men are excluded from legislation specifically because of their sexuality. The PRA encapsulates this contradiction—the gender neutral definition of de facto that it presents, ensures the rights of lesbians and gay men can be met 'regardless' of their sexuality. The maintenance of an exclusively

heterosexual definition of de facto, or relationship, in the same legal code however, holds this as a comparison and explicitly denies legal rights, privileges and obligations *because of* a person's sexuality. When the PRA is interpreted as equality then, it is only partial, reliant on the ability of same sex relationships to appear 'like' heterosexual ones (since these were the first category, and that category has only been extended not re-written). Such an interpretation is also reliant on the proviso that this equality be read at a micro rather than a macro level (it grants equality in the Acts it specifies but not in a broader, more general sense).

This leads to a curious situation that highlights the imprecise nature of this liberal democratic description. The poster campaign lauds equality. The accompanying booklet alternatively, makes the following contradictory notes:

Despite these substantial advances, lesbians and gay men still lack equal rights in many areas of the law...While this booklet focuses on formal legal rights, it is important to remember that laws can't guarantee equal treatment...Lesbians and gay men will only ever be equal when it is possible to be out when walking down the street, attending the office Christmas party, looking for somewhere to live, or attending family celebrations, without being made to feel unsafe or inferior...our victories to date show that equality will be a reality if we continue the fight. (Sanders, Finestone and Kirkland, 2000)

The idea of incremental equality that underlies the presentation of the PRA in the advertising campaign is on display in these conflicting articulations. The final sentence highlights the extent to which this is so- it is not so much that the PRA *is* equality rather it is a part of the *fight* for equality, the fight for sameness.

Despite this overt contradiction however, in its public context, the PRA emerges surrounded by equality chatter. Many lesbian and gay publications supported this interpretation of the Act. For example, the *Sydney Star Observer's* report on the legislation dated 13 May 1999, was explicitly headlined "Equality" (Topp, 1999). Similarly, Lee Gough, writing for the community magazine *Lesbians On the Loose*, in an April 1999 article discussed the law reform measures as "simply about equal rights" (Gough, 1999: 8). Notably however, this discussion of equality was also tempered by contradictory comments within the same publications. The reportage of the PRA within *Lesbians on the Loose* for example made repeated reference, similar to those above in the "Acts of Passion" booklet, to the legislation as a milestone in the ongoing battle of rights and equality for same sex couples. In July 1999 Kathy Sant, NSW GLRL Co-

convenor, was quoted as saying: "While these reforms represent a big step forward, we don't see this as the end of the road. Instead, we see it as the beginning of a process of comprehensive law reform..." (quoted in "Gay and Lesbian Law Reform: Historic victory", 1999: 5). Again, the notion of incremental equality appears to be on display in the interpretation of the PRA.

There is a particular truth to the notion of equality that the "Acts of Passion" campaign uses. This sense of equality however, is situational- the acts containing the definition of *de facto* that the PRLAB did not amend remained at the time of this advertising campaign, making lesbians and gay men distinctly 'unequal' to heterosexual couples. From the outset then, there is an intense susceptibility to contradiction contained in the 'equality' purported by the advertisements. This liberal democratic reference point is limited in its ability to articulate the experiences of lesbians and gay men (Chapter One). As the above point illustrates, this is often because it cannot admit (homo)sexuality. Moreover, because it cannot admit contradiction that so often accompanies it. The limited nature of 'equality' to which the advertisements are referring, are alluded to in the text: "We now have *some* important new rights" (*Fig. 6.2*, emphasis added). Although the absolute language of liberal democracy is being used its less than absolute nature is on display. Equality, particularly when based on notions of sameness, assumes a norm to which things are made equal. If we accept Foucault's argument, however, that norms require a deviant marker then necessarily, there is a crisis in the construction of equality. I would argue that although liberal democratic rationales speak in absolutist terms, there is a perpetual acknowledgement that this is not an assumed literal outcome the majority of the time. It would appear to me that the actual notion to which the advertising campaign defers, is a style of incremental equality. As if pouring more water into the glass indicates the potential for the volumes to be equal. Getting "in on the act" of equality is not the same as having or experiencing equality. There is a more complicated notion at work that implies motion towards the goal of equality- there is the potential for equality but this is not yet met.

At this point I want to turn to the notion of outlaws that the advertising campaign presents. It references 'in-law' as accordant with 'equality' and 'outlaw' as accordant with 'inequality'. Examining the terms and correlations is essential in understanding the implications of interpreting the PRA through liberal democratic discourse. The opening

phrase of the advertising campaign reads: "From outlaws to in-laws". In part this phrase can be looked at as an obvious legal overstatement and although, given the Dutch example allowing same sex marriage, far from being legally impossible, I think given the current political climate of Australia, it is at least legally implausible. On a theoretical level too, this phrase is also very interesting, speaking directly to the notion of outlaws. Whilst I do not contend that the "Acts of Passion" advertising campaign was ever designed with its theoretical implications at the fore, it is at least, a pertinent place from which to jump into outlaw theory having alluded to it. I believe further to this however, that the outlaw is a figure, which bridges both popular culture and academic theory and as such, believe that the intention of the movement is legitimately read at both levels.

The campaign makes reference to the theoretical framework of 'outlaws' in a double entendre phrasing, connoting a sense of 'moving on'. The opening phrase: "From outlaws to in-laws" marks this movement from the periphery to the centre, from the outside to the inside. Given the nature of the legislation as I have discussed it this movement must surely be brought into contention. If the PRA did not establish full citizen rights for lesbians and gay men, which it did not, then neither did it institute equality. Lesbians and gay men, therefore, are not fully 'in-law' as the campaign suggests. In advertising a catch cry is just that- a tactic to make people look. However this campaign does come out of an office of people proficient in law and the suggestions inherent in the wording cannot have eluded them. Indeed, one would think it a deliberate play on words and legal theory. The implications are overt. In the context of the advertisement, 'outlaw' is re-orientated through the posing of a binary situation- you are in, or you are out. Outlaw loses its connotations of being radical and the political potency of being other. It is simply an exclusion- a state of being out-of-law when the obvious desire is to be 'in'. Indeed, it eradicates this history and the legitimacy of its self- "From outlaws to in-laws"- the act of transformation, the prodigal son (re)turns. And as long as he (or she) remains in the world of coupledness, so long as they are the smiling long-termers, they will be permitted into the fold. With the new barriers of acceptable relationships firmly in place through legal sanction, outlaw tendencies, outlaw nature which is to question the status quo can be forgotten- couples can stop questioning and stop asking for more- because they are happy and included. We have "equality."

Except we do not. The PRA ensures that lesbians and gay men are still outlaws-outlawed from accessing certain relationship laws and in-law only in a contradictory manner. In the same way that the parliamentary debate pre-empted lesbian outlaw discourse, the advertising campaign and the gay and lesbian media expect lesbian outlaw discourse through the speaker's benefit. There is an expectation of other knowledge, of a freedom that is unbridled outside of law. The narratives of support examined in the previous chapter were spoken using grand visions of gay and lesbian equality that may be heralded by the passage of the PRA. In these two media examples, this vision is articulated as a concrete reality. However, in a contradictory movement, the media also employs its own reverse speaker's benefit by positioning the PRA as transcending the outlaw. Now that homosexuality has been negotiated into the truth of law through the PRA, the specific of sex has to be reread. The specific of sex in this reading is not so much positioned as homosexuality, which is read against heterosexuality but rather that outlaw is being read against in-law. What we see in these presentations is again a containing of lesbian outlaw discourse. The reverse speaker's benefit articulates the PRA as something that it is not in order to obscure the specific of sex- the outlaw- that could challenge and destabilise this new legal 'truth'.

There are a number of parallels between this outlaw status and the notion of incremental equality presented in the media discussed above. Indeed, I believe that incremental equality and outlawry are different readings of the same situation, with markedly different intentions and outcomes. What marks the difference is the notion of silence- where liberal democratic rationalities need silence to eclipse contradiction, outlaw discourse on the other hand articulates contradiction as its base necessity. Central to illustrating this are three key characteristics that the two ideas share. The first is contradiction as a key indicator. Both incremental equality and the outlaw share a common essential characteristic of contradiction. The key difference is that the liberal democratic notion of incremental equality acts to assimilate or to ignore contradiction, whereas outlaw theory poses contradiction as potential for other ways of being. The second characteristic they have in common is movement as a central function. Incremental equality is a perpetual movement that involves, in the legal case, being both in and out of law. The outlaw too, moves perpetually in and out of law, like walking through shadows. The difference here I would suggest is that the movement from out-

of-law to in-law, which incremental equality is agitating for, is like scaling a brick wall. Equality and its binary inequality lie on either side of the wall, incremental equality is the process of moving from the one to the other. The outlaw moves similarly from in-law to out-of-law however, this is (necessarily) more readily done and changes from moment to moment. What is more, the outlaw can simultaneously be in both positions. This movement therefore is more like movement through a membrane than the motion over a wall. The third characteristic I believe they share is the promise or potential that is inherent in both. Incremental equality promises the potential of inclusion in law. Outlaw maintains the potential of 'other', the potential to be something that is not described or contained.

These similarities are not co-incidental- I believe that they are descriptions of the same situation. A lesbian experiencing law in NSW, as the proceeding two chapters will discuss further, is an outlaw by these characteristics. She is also experiencing incremental equality. If this is true, then it provides further evidence to suggest that outlaw theory can legitimately theorise and consider legislation and legislative change. Indeed, its ease in articulating contradiction may render it more useful than liberal democratic absolutes.

6.4 Mass Media Interpretations of the PRA

The "Acts of Passion" campaign discussed in the previous section was a very localised advertising campaign. The primary distribution of the campaign was through the NSW Attorney General's web site. It was also distributed at events that were specific to lesbian and gay audiences and was reported by gay and lesbian media. Within the more mainstream and widespread press the PRA received, somewhat curiously, very little attention. This is where I want to turn my attention now. The initial impetus of this study was to explore the reportage of the PRA in the media- to examine the interpretations of the Act in the public sphere. I wanted to focus on the liberal democratic discourse of equality and its function and purpose in this process. Throughout 2002 however, a media frenzy in Western Australia erupted with the debate and ultimate passage of the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002*

(WA) (the AAA).¹⁰⁵ This piece of legislation confers equal (state-based) legislative recognition between heterosexual and same sex relationships. There are very notable differences between this legislation and the PRA that I will briefly consider below- what is pertinent here however, is that this media frenzy made the reportage of the PRA appear almost ridiculous. The volume of media attention that these two relatively similar pieces of legislation attracted were nowhere near comparable- indeed, the reportage of the PRA appears as a visible silence when the two reportages are juxtaposed. This comparison raised a series of other questions about the manner with which the PRA was being presented in the public sphere. Most of all it raised silence as a primary issue of consideration in the media coverage.

In order to incorporate these questions, two additions needed to be made to the media study. First, it was necessary to incorporate some of the debates from the Western Australia media coverage of the AAA in order to establish the chatter against which the relative silence of the PRA's coverage could be identified. Secondly, it was necessary to broaden the study in NSW from focussing exclusively on reportage of the PRA to incorporating other reportage of gay and lesbian issues. This maintains the focus of study within the relevant state jurisdiction, illustrating the intensity of chatter that it averages in relation to lesbian and gay based topics which forms a second tier to the argument about relative silence of the PRA's reportage. The study ultimately examines two things. It examines the presentation of the PRA in the public sphere. It then complicates this presentation with the notion of silence and examines the implications of reading the PRA in this way. I will argue ultimately, that the PRA did not attract the intensity of interest, either by way of reportage or letters to the editor that may have been expected given its controversial characterisation in parliamentary debate. Given the precedent set by the parliamentary debate on the PRA and the lengths to which discussion was raised that delineated the PRA from equality, there is a reasonable expectation that this vein of public debate will be continued in mainstream media accounts. A survey of mainstream media responses to the PRA however, does not meet either of these expectations of negative representations of lesbians and gay men or of prolonged or prolific contestation.

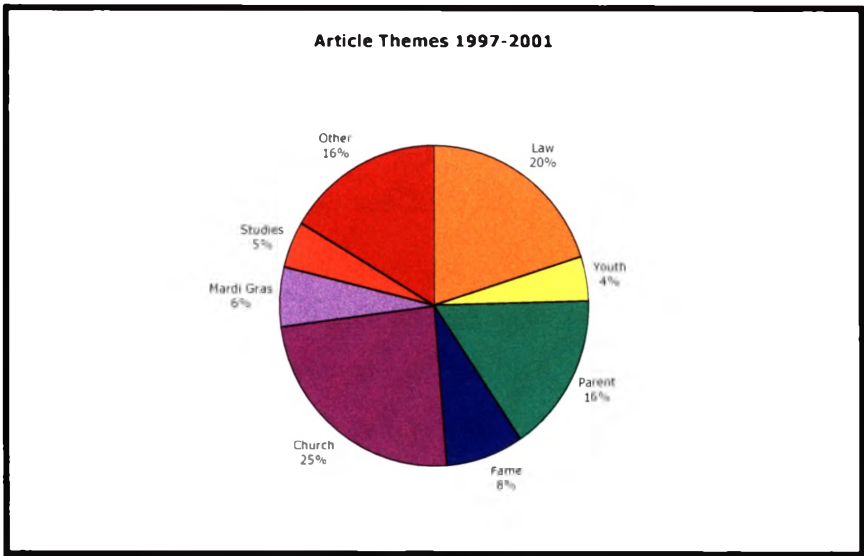
¹⁰⁵ For an examination of this see the Gay and Lesbian Equality (WA) web page (<<http://www.galewa.asn.au>>). This web site provides a comprehensive archive of media responses to the drafting and passage of the Act.

Fig. 6.3 Frequency of lesbian and gay related issues.
Sydney Morning Herald and the Australian
1997-2001.

	Law	Youth	Parent	Public People	Church	Mardi Gras	Studies	Other	Total	Articles
1997	18	6	5	9	14	1	1	6	60	52
1998	14	4	2	6	23	5	3	3	60	60
1999	26	2	1	9	13	4	9	3	67	58
2000	14	5	49	4	25	12	4	40	153	139
2001	11	1	10	6	25	3	3	16	75	65
TOTAL	83	18	67	34	100	25	20	68	415	374

Figures 6.3-6.4 represent the findings of a media study conducted on the two leading broadsheet newspapers in NSW, namely: The *Sydney Morning Herald* and the *Australian* with regards to the density and theme of the reportage of issues involving lesbians and gay men between 1997 and 2001.

Fig. 6.4 Thematic Article Breakdown (issues relating to lesbians and gay men):
Sydney Morning Herald and the Australian
1997-2001.



With the marked exception of 2000, where the issue of lesbian access to reproductive technologies saturated mainstream media in a manner uncharacteristic of the other issues analysed, the intensity of lesbian and gay discourse in Australian mainstream

media remained at a fairly constant rate. This constancy includes 1999 when the PRA passed into law. Whilst it would be incorrect to suggest that issues involving lesbians and gay men are commonplace in these publications, there is a definite presence of these issues in any given period of twelve months. In total, the articles making reference to gay, lesbian, homosexual, queer or same sex issues over the five year period numbered 374 between the two papers.

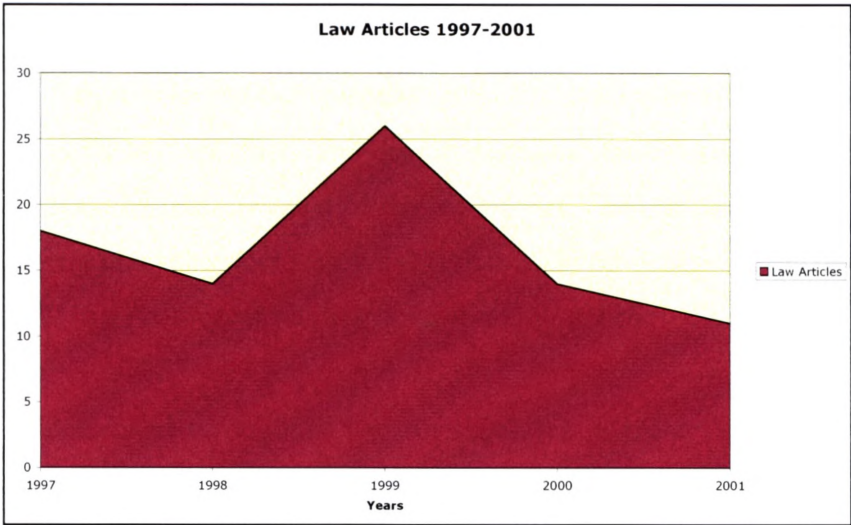
For the purposes of this study, these articles were categorised into thematic groups depending on their most immediate content (that which appeared in the heading and first paragraph). The themes used in the study are as follows: Religion (all denominations); Law (including law reform issues, court cases, discrimination claims and other legal references); Parenting (gay and lesbian parenting in general, as well as fertility issues, adoption, fostering and surrogacy); Public People (including Australian and foreign politicians, television personalities and other high profile people who were the focus of the article, not simply quoted or mentioned); Mardi Gras (formerly, Sydney Gay and Lesbian Mardi Gras); Studies (both Australian and overseas); Youth (including issues relating to schools and education, and other specific under 25 age groups); and an Other category (including all letters to the editor). There was occasional overlap of the themes in single articles, where a primary theme was not discernable. For example, "Bishops told to butt out of IVF" (*Australian*, 26/10/2000: 10) was categorised in both Religion and Parenting. The frequency breakdown of these themes appears in *Fig. 6.3*. Issues relating to the law ($f=83$) was the second most frequently identified theme, coming after Religion ($f=100$) over the five year period. As a percentage of total identified themes, legal issues comprised 20% (see *Fig. 6.4*).

As *Fig. 6.5* illustrates, the frequency of this legal discourse within the articles surveyed in NSW peaked in 1999- the same year the PRA was passed through parliament. Beyond a surface examination however, this situation is coincidental rather than correspondent. The total reportage of the PRA equated to a single article in each paper. Despite their lack of density, the articles are openly acknowledging of the legislation as primarily affecting lesbians and gay men. The *Sydney Morning Herald* article dated 27 May 1999 reads: "NSW Paves Way With Gay Rights" and the *Australian* dated 28 May 1999 reads: "Gays hail laws, but say long way to go." The articles are positioned in the

early news section of the papers (before page 5) and report the legislation in a reasonably unbiased manner.

In a textual analysis of these articles, there is little to suggest that the PRA instituted any of the doomsday predictions that were raised in concern during the parliamentary debate.

**Fig 6.5 Frequency of Law Articles (issues relating to lesbians and gay men):
Sydney Morning Herald and the Australian
1997-2001.**



There is no inkling that it may lead to same sex marriage. There was no mention of special rights. To draw direct comparisons, consider the following statements:

I seek assurance from the Government- I doubt I will get it- that the bill is not about formalising and recognising gay relationships or single-sex couples adopting children... I do not want bills introduced and passed that give an opportunity for some people who are very base- this is a fairly emotive debate- to prey on young men and affect them to the extent that they contemplate suicide or self-mutilation because of the confusion they have with regard to their own sexuality. So I place on the record my concerns that the bill is being taken for what it may not be or should not be, and that is, a recognition of homosexual rights well and truly beyond what they are recognised within the Parliament to be (Fraser, NSWLA 01/06/99 at 737).

and:

The NSW Upper House has passed the most liberal laws in Australia for same sex couples, giving gay and lesbian de factos the same property and inheritance rights as their heterosexual counterparts...The Attorney-General, Mr Shaw, said the new law, to be passed next week by the Lower House, was an innovative model with a non-discriminatory approach to property matters... (Doherty, 1999: 3).

The first of these statements taken from the parliamentary debate in the Legislative Assembly and the second taken from the *Sydney Morning Herald*, do not appear to correspond with each other although both are discussing the same piece of legislation. In the first excerpt the doomsday expectations of the narrative of opposition discussed in the previous chapter are again brought forward. The speaker correlates homosexuality with pedophilia, in a classic conservative manner, and predicts tragic outcomes for young men as a consequence. In this speech, the PRA is positioned as (vaguely) potentially causal of such events. This frame portrays the PRA (albeit terribly inaccurately) as both emotive and dangerous. The second excerpt in comparison, affects a reportage tone and frames the PRA as liberal and innovative. Certainly, the account from the *Sydney Morning Herald* does nothing to suggest controversy or to provoke public contestation so obvious in the first description of the Act. The style of factual reportage that the articles about the PRA encompass plays into this liberal democratic interpretation of the legislation. The legislation simply is. There is little to suggest that it confers lesser rights than it could or that it puts the legislative system of NSW in a position of relative state of contradiction.

This trend is continued throughout the other articles in these two papers that make mention of the PRA. On 28 June 1999, for example, the *Sydney Morning Herald* featured an opinion piece on page 15 titled: "Church Need Not Fear New Laws on Gays" discussing the religious outcry at the PRA and its potential family attacking implications. What is notable about this piece however, is that it rebuts the religious arguments against the legal recognition of lesbians and gay men and poses the PRA as a relatively unobtrusive and banal:

...the new legislation is not about to 'redefine' marriage, because it is not about marriage. It is about rights to money and property. It is about justice and fairness, and acknowledging that gay and lesbian people are citizens too. Mostly this has involved only very minor changes to existing laws, and the differences to the lives of gay people (sic) will be practical and commonsensical (Crittenden, 1999: 15).

This commentary discusses the limited jurisdiction of the PRA against the type of doomsday predictions discussed above and in the previous chapter. It also frames the legislation in liberal democratic rationalities, calling on notions of justice and citizenship rights to do so. Using similar terms as those in the narratives of support in parliamentary debate, discussed in the previous chapter, the PRA is interpreted as

relatively non-controversial through such words as practical and commonsensical which indicate a natural progression of law rather than any kind of major upheaval.

Indeed, the most coverage surrounding the PRA that indicated it was potentially controversial came in an article in the *Australian* dated 3 June 1999. The article, "Gay issues draw flak" outlined the debates on talkback radio and comments made by religious and political figures in that week which featured controversy about homosexuality. Key to these arguments however, were issues that did not concern the PRA- whether gay men and lesbians could receive holy communion in the Catholic church and whether lesbians should be able to access IVF treatment. As the author of the article notes it was ironic that these issues drew considerable media coverage since:

...two other recent gay issues (were) largely ignored by the media: in NSW, parliament passed a law confirming property rights for same sex couples, and in WA activists prepared to take their case for same sex rights to the United Nations (Rehame, 1999: M06).

If we are to understand mainstream media as a part of a public debate that is marked by heterosexism as has been discussed previously, then there is a reasonable expectation that the PRA would stimulate controversy. This article however, provides what I believe is a key consideration to understanding the relatively uncontroversial presentation of the PRA in mainstream media accounts- contextualisation. In context, the presentation of the PRA appears as an anomaly to this trend.

In general, where issues involving lesbians and gay men are presented in mainstream media, they do draw significant contestation and controversy. The flux of articles in 2000 (see *Fig. 6.5*) as I described above, is in direct correlation with the legislative debate regarding access of IVF services by single women and lesbians. Similarly linked, the majority of categories of article topic found in the table at *Fig. 6.3* are generally related to controversy- the sexuality of public figures, law reforms and religious concerns as examples. This establishes a relative chatter of controversy and contestation related to homosexuality, characteristic of heterosexism, against which the presentation of the PRA in mainstream media appears as a distinct silence.

To support this positioning of the PRA chatter as a relative silence, a broader thematic study of media coverage of other lesbian and gay related issues is necessary. I am

particularly interested in this case, to study the reportage of legal issues relating to the PRA, compared to the reportage of other issues specifically involving lesbians and gay men. In comparison to the passage of the PRA, which attracted a total of two articles, the 'outing' of Justice Michael Kirby of the High Court of Australia, attracted eight feature articles over a four month period in 1999. This was accompanied by a high volume of letters to the editor regarding Kirby's sexuality, as is evidenced by the 'other' category in *Fig. 6.3*. There is a distinct longevity to this issue and its contentious nature is marked by the responses to these articles. The community intrigue surrounding Justice Kirby's sexuality, can perhaps be explained away by a voyeuristic society, although I would suggest that the significance given to his 'outing' by the media and greater society must also be comprised of homophobic sentiment, or else why would it be of issue? Whilst the actual issue that the newspapers were reporting was the existence of a 30 year relationship between Kirby and his male partner, the perceived issue became his (homo)sexuality. The outing of such a public figure transgresses the public/ private dichotomy that liberal democratic rationalities attempt to maintain in a number of ways. A (homosexual) sexed body in the public sphere transgresses the division between public and private that traditional liberal democratic rationalities rely on. The characteristics of outlaw discourse are overt in this description. What is particular about Kirby's sexuality is that his is not just a homosexual body in the public sphere, but one engaged in and representing law as well. Given the heterosexual norm that legal systems rely on and the obvious public contradiction that Kirby poses as a legitimate legal figure, the friction is overt. Contention, represented by the media attention, arises in this specific case when the project of governmentality (represented by liberal democracy) is perceived to be under threat by an outlaw discourse.

Twelve months after the initial reaction to Justice Kirby's 'outing' another, larger issue this time citing lesbian sexuality, drew the media's attention. The court case of Lisa Meldrum, a single woman using anti-discrimination laws to set a precedent for single women and lesbians to access fertility services in Australia, featured in almost fifty articles, and numerous letters to the editor during 2000. The density of coverage given to this issue of single women's and lesbian's access to fertility services must be noted. The significance of this case is its comparability to the PRA. Both involve the issue of legal interpretation and applicability. There are obvious differences between these two cases. One is a parliamentary bill and the other a court case. One is a state based issue

and the other became a federal issue. However, the political location of the issues themselves is not of key importance, rather, the gravity of the issue as a site of controversy in the media and the interpretation of that controversy is important. Meldrum's case is represented as threatening the project of governmentality in two ways in the media coverage. The case is an affront to heterosexuality and in direct relation to this, an affront to the heterosexual nuclear family. Again, the norm/ deviant boundaries that maintain governmentality are brought under threat. The provision of fertility services to single women and lesbians directly undermines the pinnacle of the hetero-patriarchal society- the sanctity and necessity of men. This is overtly played out in the texts, particularly in the barrage of letters to the editor and opinion pieces (see 'Parent' and 'Other' categories in *Fig. 6.4*). Throughout August 2000 the *Australian* printed a series of letters to the editor regarding Meldrum's case. It featured the following characteristic comments:

A child has a natural right to be conceived, born and reared by both mother and father (Ford, 01/08/00: 12).

Every child has a right to both natural parents (Cope, 01/08/00: 12).

Women who choose to practice a homosexual life rescind their part in the process of creating life (Hersey, 03/08/00: 10).

All of these examples make a direct link between parenting and heterosexuality, reinforcing narrow, conservative understandings of the traditional nuclear family. In the top two instances the rights of the child are invoked presumably against arguments over the rights of lesbians and single women to IVF services/ parenthood. In the *Sydney Morning Herald*, the sentiment continued along very similar lines:

Men who donate sperm should ensure that it only goes to a woman in a secure heterosexual relationship where another man will take on full paternal responsibility for the child (Goldie, 08/08/00: 13).

Again, the 'natural' nuclear family is being presented in a very morals based argument, as the only legitimate and acceptable family form. By ensuring that donated sperm is only provided to women in heterosexual relationships the author suggests, IVF will only reproduce this 'proper' family form. Naturally, the debate was not one sided and a number of people responded positively to Meldrum's case. However, these responses against illustrate the overt points that mark Meldrum's case as different from the passage of the PRA. In doing so they also mark the issues that are silenced in the presentation of the PRA.

Both these issues- Justice Kirby and Lisa Meldrum- establish a trend of heterosexism, that is, contention and controversy related to homosexuality, within the *Sydney Morning Herald* and the *Australian* where the PRA was presented without controversy. The topics however, do not align precisely against the PRA- an act of legislative reform to accord rights and obligations to lesbians and gay men. The example of the AAA however, provides a more relative comparison of topic although not of geography or text. The passage of the AAA prompted a frenzy of media attention not simply to the legislation itself but to a broad range of lesbian and gay issues in general. In a period of only three months in 2002 the *West Australian* (a broadsheet newspaper comparable to the *Sydney Morning Herald*) featured more articles about the law reform process than both the *Sydney Morning Herald* and the *Australian* combined produced in the entirety of 1999. In addition, a large volume of letters to the editor (averaging between 20-30 a month) focusing on the legislation itself and other related issues to do with lesbians and gay men featured during this time. The media in WA created and facilitated a veritable bane of contention surrounding the AAA.¹⁰⁶

Each of these issues provides what I consider to be a relative chatter of heterosexism against which the silence of the PRA in mainstream media can be measured. The distinctions I have discussed between the chatter found in the parliament and that found in the mainstream press surrounding the PRA is remarkable, particularly in light of the relative media reportage of other so-called gay and lesbian issues. In order to understand how and why this situation is remarkable theoretically, I will return to the work of Jose van Dyck and the understanding of public debate put forward in *Manufacturing Babies and Public Consent* (1995). Van Dyck's argument is that public debate represents a struggle, or negotiation, for meaning (1995: 21), hence, this sectional title of negotiating truth. She insists on the idea of struggle for a number of key reasons, most important of which is the foundation of power relations that make up this realm. She argues:

¹⁰⁶ It is beyond the scope of this thesis to explore the Western Australian media reactions. However, I provide it as an example because this media has been collated in an expansive and accurate web page that is readily accessible for comparison. See the Media Archive provided by GALE (Gay and Lesbian Equality (WA) Inc. at (<<http://www.galewa.asn.au>>).

...a public debate is prefixed by the extent to which its participants are allowed to express their arguments. Individual utterances are communicated through institutionalised forms of expression, which require a particular qualification or expertise to be authorised to speak. Yet, legitimisation or allocation of authority to speak is not static; it involves a dynamic process in which dissenting voices, whether coming from individuals or from groups, can obtain more power or authority. Opinions and arguments are voiced in a field of struggle- not in contemplation but in competition (1995: 17).

Public debate then, in this reading, involves processes of legitimisation for speech rights and competition for a type of truth-teller status as I have previously discussed it in relation to Foucault. I will discuss each of these propositions in order.

The process of legitimising speech as van Dyck discusses it, is akin to Foucault's ideas on the interactions of discourses within governmentality. van Dyck describes the plurality of discourse utterances ordered through socially sanctioned authorities that makes up public debate. Similarly, Foucault describes the process of governmentality as a management process, where social institutions work to regulate the actions (including speech) of the population (Hindess, 1996: 97). What is remarkable about the governmentality process is the margin of liberty- that is, the potential for resistance (Chapter One). In van Dyck's description this potential is articulated in the "dynamic process" of "dissenting voices" whereby utterances that are dominant are also vulnerable to resistance. In the example of mainstream media portrayals of the PRA this characteristic can be examined through an understanding of discourse whereby the dominant heterosexist discourse of mainstream media faces challenge by resistant understandings of lesbians and gay men represented in the PRA.

If we are to take on the ideas of media framing discussed above, then mainstream media can be interpreted as employing a heterosexist discourse. This is most times met in an unquestioned manner, with the focus of stories involving lesbians and gay men featuring controversy at the least measure and discrimination at the most. In a Foucaultian understanding however, legislative discourse presents a traditional discursive trumps card. Truth, as articulated through legislative discourse is pervasive and dominant through social sanction. Even though the PRA preserved the traditional norm/ deviant nexus of sexualities, it simultaneously enabled lesbians and gay men (Chapter Four). When the PRA is couched in liberal democratic terms, such as it was in the media, the enabling characteristics are articulated. The contradictions presented by the governmental limiting properties of the Act are effectively silenced through its

interpretation as 'equality'. Re-read then, the PRA poses a specific quandary to the heterosexual discourse of the media- how to present this new 'truth' about homosexuality without posing significant challenge to its established and functioning frame.

If we are to suppose, as Foucault and others have, that legislative discourse accrues a high level of authority within society, then the presentation of the PRA poses particular challenges to the heterosexual discourse maintained within the media. The PRA presents a contesting truth about homosexuality- that of equality and to a lesser extent, rights- to heterosexual discourse. Van Dyck argues that utterances in public debate "are always dialogic. All representations contain and inform each other." (1995: 19) In Foucaultian terms this makes sense since discourse is interactive and power is relational. This being the case, then the PRA as a legislative discourse stands to interact with the heterosexual discourse of the media and alter, through the struggle of public debate, foundational understandings.¹⁰⁷ Invoking Foucaultian understandings of silence within discourse, Sean Cahill argues: "what is left out of discourse is often as important as or more important than what is left in. Discourses only have meaning in reference to what is absent; speech can only be understood in the context of what is not being said" (1999: 11). This is true in a Foucaultian sense if we look at the process of governmentality and how discourses act to veil the margin of liberty (Chapters One-Three). Discourses such as the lesbian outlaw are deliberately 'not said' within dominant discourses even though they interact. This characterises my supposition about the treatment of the PRA within mainstream media. The language of reportage about the PRA found in mainstream media is overtly factual and limited in its comment or opinion elements. The reportage is also brief and isolated in presentation. This reflects the dominant position of legislative discourse and the challenging nature of the PRA to heterosexual discourse.

The notable silence of media accounts, discussion and controversy reasonably expected of such a significant legislative change as the PRA, can be read in this way. However, it is important to make note that I do not characterise this struggle as one where power is hierarchically interactive, the media discourse in this case superseding the legislative

¹⁰⁷ I have made similar suggestions of the Act itself and of the parliamentary debate in the previous two chapters arguing that heterosexism and homophobic discourses have indicated potential threats by the sentiment of equality and rights espoused by the PRA.

discourse. The characterising of this process needs greater nuance to be credible. In the previous chapter, the actual legislation was in negotiation and the silence and chatter in this instance had physical implications. In this situation however, the silence of the PRA in the media does not have nearly as direct physical ramifications- the silence of reportage of the PRA will not eradicate it as a legal fact. Rather, the implications of this silence are symbolic- they act to preserve the legitimacy of the heterosexist frame. Cahill argues that the interactions of discourses create the conditions for resistance as well as creating and reinforcing dominant power relations. He argues:

freedom is exercised through resistance against the limits imposed upon the self by the peculiar power relationships of the society one finds oneself in: this resistance takes the form of the creation of a new self through transgression of limits (official and social homophobia) which others would accept. So subjectivity often develops through resistance (1999: 31-32).

In other words, power and resistance necessarily and consciously coexist in the Foucaultian equation. Cahill argues specifically that the production of deviant homosexualities within the media has led to the development of resistant discourses where homosexuality is not rendered deviant. Of the American example he argues: "official homophobic discourse created relations of struggle (an antithesis to the thesis of gay rights) which opened up sites for new forms of resistance (gay rights and queer activism)" (1999: 34). Not only is this relationship the case he argues, but more importantly its existence is expected. In this way, the limited media coverage can be considered a pre-emptive move on behalf of the media, to stave off resistance and hence challenges to the heterosexist frame it commonly employs.

This is evident in the second point van Dyck raises in the quote above. She argues that within public debate, utterances are in competition with each other vying for a truth like status. This is the type of symbolic competition that characterises the discursive interactions between the PRA and mainstream media. In Chapter Two I discussed the Foucaultian proposition that discourses construct particular subject positions through the production of power/ knowledge (Hall, 1997: 56). Within this process, dominant discourses articulate deviant positions and hence also construct norms. However, Foucault is insistent that the existence of dominant discourses does not extinguish resistant discourses (1980a: 95) hence, the constant negotiation processes and power plays of truth. I argued then, that subject positions must exist outside of dominant discourse and that these constructions could be explored as agencies of their own

power/ knowledge exterior to their otherwise subjected positions as deviant. Hence, I argued for an understanding of the lesbian outlaw, as a discourse and subject position that was other to dominant legal constructions of lesbians as deviant. When van Dyck argues then that within public debate dissenting voices can gain greater authority, she is not only describing the power plays of negotiating truth, she is also pre-empting the vulnerability of truth that this leads to. Dominant discourse is only such because of social organisation- there are other discourses of agency and their power/ knowledge can threaten the stability of norm/ deviant binaries. This thesis has discussed the extensive processes of guarding norm/ deviant binaries associates with sexuality through the construction of the PRA. This guarding process, foreshadowing the vulnerability of such truths and the existence of resistant discourse such as the lesbian outlaw continues in the presentation of the PRA within mainstream media.

6.5 Conclusion

The chapter examined framing techniques employed in the media to interpret and present the PRA to the Australian public. It has argued that the PRA was presented within a framework of liberal democracy that interpreted the Act within an understanding of equality. The first section of the chapter examined the presentation of the PRA to a primary lesbian and gay audience through the "Acts of Passion" advertising campaign. It argued that the liberal democratic framing of the PRA deferred to a notion of incremental equality where the inconsistencies and limitations of the legislation were effectively silenced. The second section of the chapter examined a second type of silence associated with the presentation of the PRA- the relative silence of chatter about the PRA contained in mainstream newspapers. It argued that the PRA was presented in these media sources as relatively inauspicious and uncontroversial. Given responses in the same sources to a set of other issues relating to lesbians and gay men- the outing of Justice Kirby and the court case of Lisa Meldrum, which was reported as legislating for lesbian access to IVF, which were significant and sustained stories within the same time frame, this silence is considered noteworthy. Also, given other media highly controversial media responses to similar relationship legislation proposals in other states, the significance of this silence is raised. The chapter then considers this silence as similar to the silence of gay and lesbian sexuality located in the analysis of parliamentary debate in the previous chapter. It argues that this silence was

both politically tactical and furthered the development of a liberal democratic interpretive framework (truth) for the PRA.

Throughout the previous three chapters I have suggested that the primary role of silence within these three areas has been to obscure the contradictions that result from the governmental process of speaking sex- specifically, of speaking homosexuality into deviance. Each of these locations of contradiction relies heavily on silence as a discursive enabler. That is, silence is utilised within these discourses to facilitate their efficient functioning where contradiction would otherwise hinder them. Silence then, is an obscurer of contradiction. Through contradiction however, outlaws are borne- within the friction as Lashgari has described it, of discursive tensions. I have argued specifically that a lesbian outlaw subject position is borne through this process found in the production of the PRA. Through this production a reconceptualisation of silence is possible- one where the simultaneous function of repressive and productive effects can exist. What I intend to do in the following two chapters then is to examine this second notion of silence through an examination of the narratives of women in long term lesbian relationships.

Chapter 7

The Act in Action:

Lesbian engagement with the PRA

"If one woman told the truth about her life, the world would split open," the woman who had read the poem aloud paraphrased. Her voice was sharp as she spoke very eloquently about being prescribed Valium when she told her physician husband that she felt her life was empty and she wanted to go to college. I remember that she spoke a long time, longer than had become customary. I remember looking across the circle at one of the other younger students in the room, trying to catch her eye and looking away when I did. I remember the sympathetic expression on the professor's face. I remember it was spring, but I was still wearing boots... But this is what I remember most of all: no matter how much truth she told about her life, the world did not split open. At least not for me (Ruthann Robson, 1997b: 1389-1390)

7.1 Introduction

The *Property Relationships Act 1984 (NSW)* establishes a framework for the legal consideration of same sex relationships which is intended to work both in and out of the court system. Out of the court the PRA is expected to facilitate engagement with other legal systems and processes. Examples of such are found in the purchasing of property between partners, in dealings with the medical profession and in the application for Legal Aid assistance. This jurisdiction will be discussed in the proceeding chapter. This chapter will focus on the in court functioning of the PRA. It will consider two key areas related to this: the actual court usage of the PRA by lesbians and gay men, and the potential for the PRA to actually enable lesbians and gay men within a court setting.

In Chapter Four I outlined the deliberate compromising process involved in the negotiation of the PRA and argued that the PRA represented a problematic extension of in-law imaginings of relationship descriptions that were based on heterosexual (patriarchal nuclear family) type relationships. This was to the exclusion of out-law imaginings, presented by lesbians and gay men, of relationship types and formations that were distinctly different in a number of ways. This chapter continues the argument. It analyses the criteria outlined in the PRA that guide a court in the finding of a relationship that is under contestation and uses data collected in a series of semi-structured, in depth interviews that I conducted with women in long-term lesbian relationships, living in the South Coast area of NSW. The focus is on the narratives of

relationship patterns, attitudes, expectations and influences described in the interviews. This is to form 'captured' narratives, a form of feminist historical methodology developed by Jill Matthews (1984) in order to make a direct comparison with expectations of relationship patterns outlined in the PRA, and to formulate a discussion that outlines the conflict, and potential similarities, between the two.

Jenni Millbank argued, prior to the passage of the PRA, that courts were unable to 'see' lesbian relationships because interpretative frameworks for doing so were lacking in NSW law. The PRA sought to address this issue, however, it does not appear to have been successful in doing so. Lesbian relationships have been markedly absent from Supreme Court cases that use the PRA and the in-law version of relationship found in the PRA is firmly based in heterosexist traditions and does not adequately accommodate the features of lesbian relationships. As a result, the chapter argues, court systems remain unable to 'see' such relationships.

7.2 Methodology

The study

The following two chapters are based on a series of semi-structured interviews with women in, or previously in, long term lesbian relationships. The interviews for this study were conducted throughout 2001-2002 on the NSW South Coast. Australia. The scope of the study was designed to focus on long term lesbian couples throughout the South Coast of New South Wales, Australia. This area ranges from the Illawarra area in the North to the Eurobodalla area in the South. *Fig. 7.1* is a statistical breakdown of population and average economic spread in this area. The South Coast is a regional area with a metropolitan centre in Wollongong city. Wollongong is a developing university city but traditionally the area is industrial- primarily coal mining and steel production.

The study relied on a recruitment process based on advertising. Particular stipulations had been placed on the research project by the governing ethics body, that ruled out various recruitment techniques, such as snowballing, where direct approaches are made to individuals asking them to participate, due to concerns of privacy and the possibility of 'outing' people (that is, revealing their sexuality) unintentionally. Advertisements seeking participants were distributed (as pamphlets) at local events organised by lesbian

groups and featured (as a community announcement) in the NSW publication *Lesbians on the Loose* with a state wide distribution of approximately 20 000. Copies of the advertisement, participant information package and a list of interview questions can be found in Appendices 3-5 of this thesis. The advertisement calling for interviewees asked: “Are you, or have you been in, a long term lesbian relationship?” This was a deliberately non-specific question designed to allow individual interpretations of both ‘lesbian’ and ‘long term’. My interest in how people chose to describe themselves as lesbian was less than my interest in how people defined long term. Since I do not hold up the women interviewed as representative of ‘the lesbian’ or even typical of all lesbians, I was only concerned that in some way these women chose to self identify as lesbian for their inclusion in the interviews. The issue of whether or not the women were in long term relationships was more of an interest, since the PRA stipulates the length of a de facto relationship is two years in the majority of instances.

Figure 7.1: A Comparison of Population Indicators.
South Coast of NSW Local Government Areas

	Wollongong	Shoalhaven	Eurobodalla
Population	181 612	54 672	33 317
Median Household Income (wkly)	\$300-399	\$400-499	\$400-499
Occupations			
Tradespersons	14.1%	16.3%	14.1%
Professionals	19.4%	14.7%	14.1%
Clerical	16.5%	14.8%	15.9%

(Figures from 2001 Australian Census, Published by the Australian Bureau of Statistics).

The interview design was semi-structured to elicit narratives from the women interviewed. The major purpose of seeking narratives within the interview process was to generate stories that could be juxtaposed with the legal narrative of the PRA.

Generating experientially based narratives from the lives of women is a traditional feminist methodology that is not without criticism (See the following edited works for example: Tomm, 1989; Fonow and Cook, 1991; Maynard and Purvis, 1994; Ramazanoglu and Holland, 2002). Central to these criticisms are concerns about the validity and integrity of the types of knowledge produced through feminist research methods (particularly those grounded in recording and analysing women's experiences), which are relevant to this study (Maynard and Purvis, 1994b: 5-7). These criticisms include specific concerns relating to how information is gathered (a question of power dynamics between interviewer and interviewee) which may influence responses and the quality of the interview; concerns about how interviews are interpreted by researchers (a question of validity and truth of information gathered); and concerns relating to the limitation of individual experiential research (a question of subjectivity within the research and the individuality of responses which cannot necessarily be generalised to represent a larger population). The latter of these three concerns I will explore theoretically below. The two former concerns however, I will explore here in relation to the specifics of my methodology in this research.

Many early feminist debates of methodology advocated qualitative research methods as an appropriate form of research for eliciting the stories of women's lives, so often absent from sociological research (Jayaratne and Stewart, 1991: 89-90). Qualitative research, particularly in the form of semi-structured (found in this thesis) or unstructured interviews, were perceived as "methods which permit women to express their experiences fully and in their own terms" (1991: 89). There are, of course, some epistemological concerns with such processes including the problems of power dynamics between interviewers and interviewees described above. To address such concerns, three specific actions were in place in the interview process for this thesis. First, interviewees were required to opt into the process voluntarily. There were no direct approaches made to individuals which was an attempt to empower participants to tell their stories voluntarily. Second, interviews were conducted at locations that interviewees nominated as being comfortable. In two instances this was within the researcher's office environment for the ease of interviewee's circumstances (primarily, work commitments), however the others were conducted in home environments at the direct invitation of interviewees. This process was designed to maximise the interviewee's comfort and again to empower the interviewee by giving them the ability

to direct the interview process in a way that suited them. Finally, the semi-structured nature of the interviews was introduced to participants as a guide to the types of topics I wanted to cover in the interview process (these were provided ahead of time). However, interviewees were given express permission to talk on the topics as they saw fit- to include as much or as little information as they felt comfortable on any given topic, to cover topics in any order they wanted and to introduce any other information or topics they thought were relevant to the issues involved. Interviewees were also given the opportunity (which some took up) of vetoing the inclusion of specific information in the research that emerged in the process of the interviews. All of these were designed to give the interviewees an ownership of their interviews and the knowledge generated from them. Related to this ownership of information, interviewees were also given the opportunity to review their transcripts and/ or included quotations prior to the publication of the research. There is no way of accessing the 'truth' of any given narrative, and the information given in the interviews was then interpreted by the researcher adding an analytical layer to the study. However, this check process at least provided interviewees with the opportunity to assess the validity and accuracy of the research itself and to expand or clarify specific comments, if so desired, to better reflect the intention of the statements made in the interview.

Methodologies are less useful in addressing questions of subjectivity and the individuality of responses. These are fundamentally theoretical questions relating to feminist research itself. There are a number of concerns that have arisen in response to this type of scholarly activity, particularly within legal arenas. Narrative works, particularly the generation of outsider narratives, have been used by marginalised groups- based on race, sex and sexuality for example- to express experiences of law other to mainstream and to conflict with mainstream legal rationales (Robson, 1997b: 1387). As Ruthann Robson argues however, accusations of essentialism, "nonobjectivity", and accuracy and verification problems have been levelled at narrative investigations (1997b: 1401-1406). I agree that there are a number of epistemological problems with narrative work, and none of these accusations are without foundation. In a sociological sense, the results are individual, which means that they are subjective and do not form a pattern of repeatable answers that can be easily or systematically reproduced for verification. However, I believe that it is a valid form of socio-legal research for a number of reasons despite these issues.

Foremost of these is the fact that story telling by and between women, is a cornerstone activity of many second wave feminist movements and theories. As such, narrative work is an appropriate practice for a feminist inquiry. Dale Spender, for example, argues that part of the fight against patriarchy, and the systematic erasure of women in history, is the process of seeking and recording women's stories and imbuing such stories with the authority assumed of men (Spender, 1983: 8). In this way, alternative versions of the world are formulated. This is in keeping with Foucault's notion of the discursive construction of truths. The other primary reason I was prompted to produce narrative responses was to elicit a multiplicity of vocality to fill what is usually presented as the silence of lesbians within the Australian legislative system. This was aimed at illustrating that there are actual and discursive engagements between legal systems and lesbians, even when the law refuses to admit homosexuality. It was also aimed at drawing out the specifics of these experiences to enhance the legal understanding of homosexuality in Australia. Robson argues that mainstream legal theories and practices are "impoverished" (1997b: 1387) for the lack of queer, lesbian and gay perspectives, and that the generation of "outsider narratives" from these people can enhance and educate legislative discourse (1997b: 1399). Since I have argued that the PRA excludes the lesbian outlaw (symbolically), and lesbians (actually), the generation of narratives about and around the PRA are in part designed to fulfil this function.

Jill Matthews in *Good and Mad Women* (1984) uses the term "captured biographies" (1984: 25) to describe her research and it is a term I adopt here in my methodology. Matthews argues that there is a need to consider "the everyday lives" of women (1984: 19) but discusses a number of problems in this historic process. Since women have traditionally not appeared in history, the feminist act of uncovering women's histories is necessarily piecemeal, individualistic and subjective. Women's history unfolds in letters, journals and a range of other isolated sources such as the psychiatric case notes that Matthews's study is based on. There is the a tension drawn between the need to research individual lives, the rich information gained in doing so and of course, the validity of interpretation and generalisations made in the process. Of the latter issue, she argues "(t)he patterns of each individual's life are created by personal decisions made in unique circumstances...but the circumstances are generally shared by many others, and

the decisions also have to be made by everybody else..." (Matthews, 1984: 30). This is the basis of Matthews's work using 'captured biographies' - that is, studies of women as they stand in any given moment of time and in under particular circumstances.

The purpose of a captured biography is to discern patterns from the individual and to discuss the ways in which these individual biographies can make us think about society in a more reflexive manner. Although there is a need for constant checks when using small numbers of individual stories to discuss the broader population, Matthews argues: "The meaning of being a women cannot, ultimately, be deduced from however much data. That meaning is lived, and hence perverse reality, and the accuracy of any understanding must be tested by all of us who live in it." (Matthews, 1984: 29). It is utilising this notion of captured biographies that I present my participant interviews. Although generalisations of the lesbian population cannot be made from such a small scale study and individual narratives, I do believe they can help us to think in a more creative manner about the ways in which the legal system and lesbian lives intersect. If for no other reason, I offer them as stumbling blocks to mainstream understandings of relationships and the laws that govern them based again on cues from Matthews:

In what would otherwise be a straight forward history that makes coherent patterns of social experience, they [the captured biographies] are a consistent reminder of the anomalies, the gaps, the untidiness of real social life. History is only made coherent after the event by omission of what does not quite fit. (1984: 26).

Since I have argued throughout this thesis, that the lesbian outlaw subject position is located discursively within and without legal discourse, I am drawing a parallel in these two chapters between this subject position and the women interviewed who share a similar situation through the PRA. This is not to discount the various other narratives that intersect with the lives of these women. It is, rather, to capture the narrative of lesbian interaction with the PRA at a particular time, and to use this knowledge to reflect upon the legal system in order to generate a new set of questions about the PRA. The narratives that emerge from the interviews I characterise as lesbian outlaw truths - that is, they represent the power/ knowledge of lesbian outlaw discourse. This will be demonstrated throughout the ensuing chapters.

The participants

In total, nine (9) women were interviewed, representing five (5) relationships in six (6) interviews. One participant based the answers to her interview on a previous long term relationship. Interviews ranged in time between one and two hours and were conducted, at the discretion of participants, either individually or as couples. The majority of interviews were conducted face to face with the researcher however two couples were interviewed by phone. The interviewees were geographically spread throughout the entire coastline and therefore lived in a variety of town types- from the central city of Wollongong itself, to smaller suburbs through to small and relatively isolated rural communities. The recruitment process for the interviews asked women to identify their own relationship as long term or not. The length of relationships within the interviews ranged from over two years to over twenty years. The majority of occupations of the other interviewees were professional or semi-professional and all participants had a regular history of employment. Although not all of the interviewees were necessarily employed full time at the time of the interview (and one was a full time student), all expressed a sense of financial security in their interviews, such as property ownership. All the women interviewed owned their own property with the exception of one who was living in a house owned in full by her partner. The two were however, saving for their own property.

As Appendix 5 indicates, the interview questions related solely to law (and indicators of the legislation such as housework labour divisions and relationship documentation). Specific questions relating to employment, income and ethnicity were not standard to the interviews. Throughout the narratives however, a number of comments were made indicating at least occupation, employment status and income. In the formulation of the interview questions, there were two key reasons why this information was not systematically requested. The first was a methodological problem stemming from limitations placed on the researcher by the governing ethics committee. These limitations included the prevention of snowballing techniques of interviewee recruitment which would have enabled specific contact with individuals in an attempt to include a diversity of interviewee backgrounds. Instead, the study reflects the

individuals who first were able to access the advertisements for the study¹⁰⁸ and second, those who chose to initiate contact with the researcher. As a result, the sample of interviewees is not representative of the wider population in terms of class or ethnicity in particular.

There are limitations to any study when factors of identity, particularly class indigenous and other ethnicity categories are not considered in intersection with the law. This is a particular limitation of this study. In particular, this is true of the lack of information contained in this study relating to Aboriginal lesbians. Aboriginal people have different relationships to property than many non-indigenous people, a very specific history with the law and a very difficult present (as can be seen in the over representation of indigenous people in prisons in Australia). To do these issues justice is outside the scope of the current study and can currently only be acknowledged as a limitation. Obviously, socio-economic status, ethnicity and identities other than sexuality have significant impact on the responses of the interviewees and therefore, the outcomes of this study. It is a legitimate criticism levelled at many feminist academic endeavours that the relative privilege of being white and middle class is a point of viewlessness not unlike patriarchy is for many men (Collins, 1991; Phoenix, 1994; Ramazanoglu and Holland, 2002). I judge this limitation with gravity, however my second strand of reasoning for not asking particular questions about identity other than sexuality is one that I stand by. It centred on my concerns that those interviewees who chose anonymity in the study, would not be required to give up information (such as occupations and ethnicity) that could be indicative of their identity within the study. Since the study was based on biographical narratives, there was a high probability that some identifying characteristics of individuals and partnerships could reveal actual interviewee identities, and I wanted to minimise that possibility. Many of the geographical areas in which this research was conducted, are small and regional, have isolated lesbian communities, and high incidences of homophobic sentiment through to homophobic violence.¹⁰⁹ For an array of these reasons, some interviewees are not generally open about their sexuality within their communities and I wanted to allow the interviews to facilitate that choice.

¹⁰⁸ Anecdotal evidence from observation of public events where the fliers were distributed suggested that a variety of women had access to the information.

¹⁰⁹ Generally, the incidence of homophobic incidences, including discrimination, abuse and violence is high in Australia. Numerous reports indicate numbers higher than 75% of respondents have experienced some form of homophobic violence or abuse (Draper and Hall, 2000).

Certainly, there were general questions that could have been asked such as income brackets, which in combination could have given the study some quantitative foundation. Similarly, the questions could have been optional. However, since overall participant numbers were so low, and since the aim of the study was qualitative narrative responses, I made a conscious decision not to require this information, and to use it only if: a) the information was volunteered by the interviewee and b) if the express permission of the interviewee was gained to utilise this information.¹¹⁰ There are points to be made on both sides of this argument. It is a topic that I have still not fully reconciled and suspect that it will continue to be a debate that I have with myself and others in the future. Because the answers do not exist however, the reasoning not to request such information from interviewees, for the sake of safety and reassurance of the participants was integral to the project.

As I discussed above, I do not hold the interviews up as the truth about lesbians and lesbian engagement with the Australian legislation. I offer them instead, as individual 'captured' narratives that express individual experiences based on a person's lesbian relationship. They are, as Robson has argued the need, the start of such a story telling process, rather than the totality or end.

7.3 Usage of the PRA

Since the inception of the PRA,¹¹¹ the Supreme Court of New South Wales has heard four cases of property disputes under s.20 of the Act, involving same sex couples. All of these cases involved gay male couples.¹¹² It has heard three using the 'close personal relationship' (carer) provisions of the Act.¹¹³ Comparatively, over seventy cases of heterosexual couples have been heard in the same period using the PRA.

¹¹⁰ Some interviewees asked for specific information volunteered in the recorded interviews not to be used in the study. Similarly, many *potential* interviewees asked specific questions regarding the inclusion of identifying information in the study. My inability to assure *complete* anonymity to these people is, I believe, one of the key reasons some did not continue with the study (attrition rate of enquiries to interviews was approximately 50%). Although this is not the only cause it was, I believe, one of the key ones) For these reasons, I believe my choice to structure the questions to maximise anonymity was justified.

¹¹¹ Period examined was June 1999-June 2003.

¹¹² Note that this gender balance is the reverse to findings by Jenni Millbank (2000) in her analysis of court documents using the *Domestic Relationships Act 1994 (ACT)* which provides similar provisions to same sex couples involved in property disputes, over a similar time frame (5 years).

¹¹³ See Appendix 2 for case details.

There are a couple of obvious questions to arise from these figures, primary of which are considerations as to the low frequency of same sex cases being heard and more specifically, where are the litigious lesbians? I will discuss the first of these issues in the following section. I want to consider here, the absence of lesbians from the cases that have reached the Supreme Court using the PRA. I do not intend to make grand claims about gender skews, given the relatively small number of cases we are talking about. However, I do believe a feminist analysis of the PRA cannot ignore the fact that all four same sex cases heard under the act represent gay male couples. Within the time frame of the study, it should be noted that one property claim, which involved a lesbian relationship, did come before the Supreme Court. West v Mead (2003) was a property case that would have had jurisdiction under the PRA, except that the relationship ended prior to the PRA coming into effect. Not containing retrospective coverage, the PRA can only be applied to relationships that ended post June 1999. The relationship involved in the case was found to have ended in 1999 prior to the passage of the PRA. There may be great significance in the time lag between the relationship end and the ensuing court case. Cases may well be pending under the PRA that fall into a similar time lag, and the results of a similar survey in another five years time may well demonstrate an increase in the rate of same sex couples using the PRA. For various reasons that I will discuss both below and in Chapter Eight however. I do not strongly anticipate such a radical change in usage. I have a number of suppositions about why women are not represented in the cases that have been heard under the PRA.

First, I want to recall discussions in chapter one about the essential male bias contained in law. If feminist jurisprudence is right, and legislative systems represent patriarchal order, then certain aspects of court systems may be prohibitive in some sense to women: access to court systems, treatment within, attitudes towards, and issues of contention brought before the courts may all be influenced by patriarchal overtones. Similarly, if we are to agree with lesbian feminist jurisprudence that such systems also contain heterosexist bias, then lesbian litigants potentially face a prohibitive double jeopardy framework when facing court action. The specific of women within litigious situations is also tempered by general financial attributes as well. Since the 1907 Harvester Decision, the minimum wage in Australia assumed women's economic reliance on men (Thornton, 1998: 85). Minimum wage discrimination continued to be written into legislation until 1974 (1998: 86). Its legacy remains however, with women still

estimated to earn approximately 80.5% of men's full time wages and 65.5% of men's total wages. Without making gross assumptions about the employment patterns of lesbians, it is statistically safe to assume that if the earning power of a woman is less than that of a man, then lesbians are statistically likely to be poorer than their gay male counterparts. If this is true, then the prohibitive costs involved in litigating may also contribute to the absence of lesbian couples in the court system. Given that the PRA makes provisions for local courts to adjudicate claims that are less than \$40 000¹¹⁴ it may also be the case that women are being represented at this level of litigation more so than in the Supreme Court. Worthy of note however, is the fact that Millbank's study of (ACT legislation) found the opposite gender skew to be true. This is an interesting comparison, worthy of further investigation beyond the scope of this thesis.

In addition to these gendered particularities, I would reiterate a number of notions outlined by Millbank in her study of similar property law provisions in the Australian Capital Territory, dealing with the particularity of sexuality. She argues three key contributing factors to the relatively small participation of lesbians and gay men in property disputes that are relevant to this study: a lack of prevailing knowledge of appropriate legislation for lesbian and gay couples; a reluctance on the behalf of lesbians and gay men to access the legislative system; and the relative low rate of property ownership amongst lesbians and gay men (2000: 170). I believe these are important and accurate considerations. I believe too however, that the relatively low figures more accurately stem from what Millbank has elsewhere described as the inability of court systems to "see" lesbian relationships.¹¹⁵ I will explore this supposition in the remainder of the chapter.

I contend that the PRA renders a woman in a long-term lesbian relationship, a type of outlaw figure in her engagement with legislative systems. This is primarily because the law in NSW now gives her partial, but not full, legal recognition. Her relationship is in-law some of the time, and out-of-law some of the time. She is visible in certain (legal) lights, and not in others. The contradiction of recognition introduced by the PRA

¹¹⁴ Provision made under the *Local Courts (Civil Claims) Act 1970 (NSW)*.

¹¹⁵ I believe that this stems from both the inadequate provisions of the PRA as well as a cultural inability on behalf of judges themselves, to be able to recognise lesbian relationships (as will be witnessed in the discussions below that quote particular judgements).

however, is not limited to Acts included and those not. It also stems from the formulation of 'relationship' that is presented in the Act- a heterosexually based description that has simply been extended to 'include' same sex relationships. The heterosexual bias contained in this description means that lesbian relationships are also variously visible and not in a court setting according to their various ability to 'fit' into the style of relationship the Act proscribes.

I am uncomfortable making gross generalised claims about the sameness and difference between heterosexual and same sex couples. On the most part, this is because difference has been integral to campaigns of slander and homophobia against lesbians, gay men, bisexuals, and transgendered people and of course, is at the root of all other hurtful discrimination, particularly sexism and racial hatred. In part my unease also stems from the increasing trend in psychological measures of similarities and differences between heterosexual and homosexual relationships that have (re)emerged in recent literature. This, to me, appears too closely reminiscent of homosexuality as a psychological disorder for it to be a comfortable supporting literature for this work. And yet, if I am to argue that the law has difficulty 'seeing' lesbian relationships, despite the PRA, then I am ascertaining some level of differentiation. I want to explore this assertion then, using comments made and points raised throughout my interviews. Whilst I do not hold that these are universally applicable there are specific historical and cultural influences that necessarily need be considered.

1. Socio-political influences

The divide between political lesbianism and same sex attraction between women has been variously debated. Calling for a resurgence of the political, Sheila Jeffreys argues that feminist politics have been increasingly detached from lesbian relationships and communities. She argues however, that the impact of such politics remains firmly visible throughout lesbian communities, in the form of publishing presses, events, archives and the like which are maintained today (1993: ix). Because of the ways in which women described their relationships in the interviews, I would argue that lesbian feminist politics are more prevalent and overtly influential than Jeffrey's rather bleak

view suggests.¹¹⁶ Lesbian feminist politics and lesbian separatist politics have critiqued heterosexual norms and expectations. The influences of these critiques are evident in a number of interviews. Patricia¹¹⁷ for example, spoke of her "compulsive heterosexual days", a concept overtly influenced by Adrienne Rich's notion of compulsory heterosexuality, a mainstay of lesbian feminist politics in the 1970s and beyond. She later confirmed her political point of reference when discussing relationship patterns, stating: "hopefully we don't follow a heterosexual model." Similarly, Sand¹¹⁸ spoke of the simultaneous developments of her sense of feminism and her choice of lesbianism; Jack¹¹⁹ discussed her work in lesbian politics. Each of these influences is directly reflected in decisions made about an individual's relationship, as will be discussed in later analysis of the interviews.

2. Historical influences

There are a number of historical trends and experiences that have the potential to specifically influence many lesbian relationships. The majority of these will be further discussed in this and the following chapter. The most pertinent of these, however, is worth noting separately here and has to do with the historical legal treatment of lesbians. Because laws and legal systems have been prohibitive (Aldrich and Watherspoon, 1992; Fogarty, 1992; Aldrich, 1994; Chetcuti, 1994; Willett, 2000), have specifically accosted lesbians (Joyce, 1998; Faderman, 1992), have threatened the relationships between lesbians themselves and lesbians and their children (Bateman, 1992; Stuhmcke, 1997; Millbank, 2002; Smith, 2003) or have had a tendency to disregard lesbian relationships altogether (Rowland, 1988), there are emotional, psychological and physical barriers between many lesbians and legal systems. This is a particular consideration in this study, given the longevity of the relationships being

¹¹⁶ This is not to denigrate Jeffrey's work, which raises a number of interesting and relevant observations, particularly related to generational differences of political influence. What it is to suggest however, is that the transformation of politics into relationships and lifestyles is perhaps more subjective and diverse than Jeffrey's give credit to. This however, is a debate to be had beyond the scope of this thesis.

¹¹⁷ Patricia (i3) is a middle aged woman who lives on her own in a property that she owns. Her interview answers were reflections on a previous long term relationship that had ended amicably. Patricia works within the legal system.

¹¹⁸ Sand (i6) is in her forties and lives with her partner of over five years. The couple co-own their house and Sand also has part ownership of women's land where she likes to retreat. Sand is particularly active in political and community organisations.

¹¹⁹ Jack (i1) is a woman in her forties who has been in a relationship with her partner for over five years. The couple own a house and share the property with Jack's mother. Jack has an adult daughter who is not a child of the relationship. Jack works in community welfare and is particularly active within lesbian organisations and activities.

discussed, and the experiences of the majority of the women being interviewed who often cite their previous lesbian relationships as influencing their current ones. The majority of the women interviewed have witnessed, if not experienced, legal discrimination that pre-dates the PRA. The witnessing of this discrimination is also a result of stories in the lesbian and gay press, and a result of less formal forums and conversations. In the next chapter I will discuss the ways in which this historical burden has prevented and perverted the use of legal systems by many lesbians. It also has a direct correlative effect on the structuring of many lesbian relationships discussed in the interviews. For example, Patricia suggested that working in the legal profession had exposed her to too many incidences of legal discrimination against lesbians when they were financially enmeshed. She told me that this had meant she maintained separate finances within her (then) relationship. Jen and Jenny¹²⁰ discussed the stories of contested wills that they had heard. This initially dissuaded them from writing their own wills, because of a sense of futility. Given the general closeted nature of their relationship at that time, this meant that their relationship was very insularly structured and without significant legal or social acknowledgement.

3. Cultural influences

When asked to discuss influences on the structuring and functioning of their own relationships, greater than any other response was the influence of lesbian friends and other lesbian relationships that they have witnessed. Sand for example told me: "Since working out that of all the sexuality choices in life, lesbian was the one that suited me most, which was...around twenty, lesbian has been my primary cultural identification." This emphasises the extent to which lesbianism is considered, amongst many women, to be a specific cultural group as well as a category of sexuality. The significance of such responses is to suggest specifically, that lesbian relationships are not mimetic of heterosexual relationships. One would expect, since there are more visible heterosexual relationships in the world than lesbian relationships, that a more common response would be reference to parental relationships, those of siblings etc. This however, was

¹²⁰ Jen and her partner Jen (recorded as Jenny in this thesis for clarity) (i4) live in a small community in the far South Coast. They had been in a relationship with each other for over twenty years. They own a house together and are generally open about their relationship within the community and neighbourhood. This comes after a relatively closeted period when they passed as housemates living in a much smaller community.

not the case, and is illustrated in the response of Anne¹²¹: "neither of us wanted to have a relationship like our parent's relationship." Instead, in the interviews, there is an overriding tendency to refer back to the influences of specific lesbian relationships—whether they are their own in the past, those of their friends, ex-partners or acquaintances. Patricia for example, argued that although she took as a guide the commitment and loyalty of her parents' relationship, her lesbian relationship was not based on her parents' relationship: "it was influenced by other lesbians and the ways that they lived... (speaking of specific relationship structuring patterns) I probably went into someone's house and saw it..." What these responses indicate is a circular pattern of influence between lesbians. Certainly there are other influences, however the primary one tends to be other lesbian relationships. Where a lesbian specific pattern of relationship is not available for reference in any given instance, there is a tendency to discuss a feeling of having to 'make it up'. Jo and Sarah,¹²² for example, discussed a feeling of having to make up the rules as you go along in a lesbian relationship. What this indicates is that, in self-assessment, these women are actively attempting to formulate their relationships outside of heterosexual models.

This was also reinforced by a number of references made to the desire not to structure lesbian relationships on heterosexual patterns. Anne for example, said of the structuring of her relationship that: "Neither of us wanted to have a relationship like our parents relationship." She continued by explaining that although she thought that heterosexual and same sex relationships were more similar than many heterosexual people may think, that there was still an ideal that could be strived for within lesbian relationships:

Everyone has to share power in relationships but I think that lesbians can do it a lot better than heterosexuals, there can be more negotiations... in straight relationships men are expected to behave in a certain way and women are expected to behave in another way...we don't have that, we can be more free which can give us...more room to negotiate our relationship the way we want to be within our relationship.

For Anne then, there was a tangible difference that marked and should mark, lesbian relationships. This was supported by comments from Patricia who told me that when

¹²¹ Anne lives with her partner Mary (i5) in a small town in the "country" of the far South Coast after moving from the fast pace of life in Sydney. The couple have been together for nine years. They live in a house which they co-own. Anne is in her early forties and is semi retired.

¹²² Jo and Sarah (i2) are a young couple who have been together for over three years. Sarah had been studying at University prior to the interview and Jo worked in a full time position. The two women lived together in a house owned by Jo and were saving to buy their own house. They had celebrated their relationship with a commitment ceremony in front of family and friends.

she saw patterns emerging in her relationship with another woman that mimicked traditional heterosexual roles, she would discuss them, and the ways in which they could be changed. For these women there was a definite desire to formulate their relationships within a specifically lesbian cultural context that was marked by contrast to heterosexual relationship patterns.

The PRA poses significant barriers to a court being able to 'see' these lesbian relationships because the legislation is not specifically catered to a lesbian audience. All of these responses suggest potential conflict between the (heterosexual) model of relationship found in the PRA and these lesbian relationships which it may be asked to govern. The specifics of this conflict will be argued below.

In general, legislation provides the interpretive framework to common sense notions. In litigious circumstances, this is an expected function of laws and legal systems. When opposing claims are made about the same set of circumstances, the court, or more precisely, judges, are expected to arbitrate based on the weight of evidence for proof and legislation for its interpretation. However, despite liberal democratic appeals to the neutrality of law, which would facilitate such interpretations objectively, the bias of legislation can have devastating effects. This is particularly the case when interpretations are systematically opposed to common sense understandings present outside of a court setting. This was often the case when same sex relationships were presented in court prior to the PRA, as the case of Hammon v O'Brien (1990) illustrates. As Jenni Millbank has commented (2000: 180) this case is indicative of the need for the inclusion of same sex relationships in property law. It illustrates the precarious nature of property involved in lesbian relationships prior to the introduction of the PRA but, I would argue, it also illustrates the bias of interpretation of common understandings such as the definition of a 'home', the central site of contestation in this case. What I believe this case also illustrates then, is a legal contestation of vision and interpretation. The lesbian relationship between the two women seems to disappear as soon as it enters the legislative arena.

The dispute in this case was between two women who had previously been in a long term lesbian relationship together. The focus was a property owned in whole by one of the women, although lived in by both women for the duration of the relationship, with

each making equal contributions to the upkeep and decision making processes involving the house. The case revolved around a legal document the women had drawn up when purchasing the house, indicating that should the house be sold, both women would share equally in the profit or loss resulting from the sale. The defendant, who did not own the house, argued that the document, and a verbal agreement between the women, implied an equal interest in the house regardless of its sale. The court disagreed. McLelland J found that: "the property would be used as a joint home of the parties so long as their personal relationship endured. In my opinion the defendant had no legal right enforceable against the plaintiff to occupy the property at any time, and certainly not after their personal relationship had terminated." (1990 at 11). The findings in this case ultimately left one woman homeless and without property assets because of the disintegration of her intimate relationship.

Millbank argues that this case is an "absurd legalism" (2000: 180) where the court, lacking an interpretive framework to the contrary "did not appear able to 'see'" the partnership between the women. Prior to the PRA, literature offering legal advice to people in same sex relationships often cited the writing of legal documents as a way of indicating legal preference with regards to property division, inheritance, guardianship and power of attorney. In the case of Hammon v O'Brien (1990), the issue was not the legality of the document rather, the specificities (or lack thereof) of the document. It spoke only of the intention to equally share the profit or loss resulting from the property's sale and did not give an explicit indication of how the property was to be considered absent a sale. Hence, when the property entered the legal arena, it moved from being the 'home' of the two women, to simply a house- a singularly owned financial asset. Similarly, the relationship between the two women moved from being a lesbian relationship, to being an agreement between two legal strangers in a legal document.

The impact of the decision temporarily aside, the interpretive framework of the judgement is indeed an interesting site of analysis. It strikes contrary to common understandings in two key ways by denying the "equal partners" foundation of the relationship that Millbank claims is obvious from the testimony and documents brought before the court (2000: 180) and by also denying the emotional understandings that a home denotes, dealing with the property in question as a financial transaction alone.

Millbank suggests this case ultimately highlights is that absent a legislative, interpretive framework to the contrary, the women are legal strangers and, I would argue, the property under scrutiny, is a house, not a home.

Given the existence of the PRA, had this case been heard post-June 1999, it could be expected that this omission would be of lesser consequence to the woman who did not own the house. The PRA provides for the division of property based on the idea of mutuality- the understanding that a relationship is larger than the sum total of its financial transactions. In deciding property settlements, contributions to the household (both financial and non-financial) and the welfare of both people in the relationship are taken into account. The 'home' should stay exactly that in its legal representation: a home, imbued with daily activities, daily expenses, a sense of security, and intentions for the future. I will argue throughout this chapter however, that this is not necessarily the case. I will argue that it is not necessarily the legality of a relationship that has been the problem in past cases such as Hammon v O'Brien (1990), but, as Millbank has described it, the inability of legal systems to 'see' lesbian relationships. The PRA, I will argue, has not necessarily provided the spectacles that make lesbian relationships visible to legislative systems.

7.4 Usage of the PRA: the continued invisibility of lesbians in the court system

Although the PRA establishes a framework for the legal consideration of lesbian relationships there are two preconditions that must be met for this to eventuate. In the first instance lesbian relationships must be brought before the court, which, as this chapter will discuss, does not appear to be happening. In the second instance, lesbian relationships must be recognisable as such when they are before a court. Again, I this is not necessarily an eventuation of the PRA. Section 4(2) of the PRA establishes a (non-exhaustive)¹²³ list of determinates of a de facto relationship, which a court may apply when the existence of the relationship is under contestation. It reads:

¹²³ S.4(3) of the PRA reads:

No finding in respect of any of the matters mentioned in subsection (2)(a)(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case: (a) the duration of the relationship, (b) the nature and extent of common residence, (c) whether or not a sexual relationship exists, (d) the degree of financial dependence of interdependence, and any arrangements or financial support, between the parties, (e) the ownership, use and acquisition of property, (f) the degree of mutual commitment to a shared life, (g) the care and support of children, (h) the performance of household duties, (i) the reputation and public aspects of the relationship.

The history of gay and lesbian relationships within the court system has been one characterised by contestation and so in the particular case of same sex relationships this list of determinants is potentially pivotal in order to be able to 'see' the relationships. The social invisibility of so many same sex relationships has caused family contestations of such relationships in court and has enabled some to disavow their own relationships in court. In a more general sense, the community awareness of the contestability of same sex relationships situations that the PRA encompasses appears to be significant. For example Katzen, when discussing the push for the PRA cited instances in Australia of same sex partnerships being contested by families during the 1980s and 1990s AIDS epidemic (cited in Cahill, 2000: 19). These (primarily) men had been excluded from the funeral of their same sex partner, had been evicted from their homes after a partner's death and had been denied hospital visitation to their partner. During the interviews, this vulnerability of same sex relationships featured in reference made by Jen and Jenny to the Sharon Kowalski case. The case played out in the American courts throughout the late 1980s and the early 1990s. Kowalski was incapacitated in a car accident and her parents contested the applicability and desirability of Karen Thompson, Kowalski's partner of some four years, to care for her. At times throughout the proceedings, they denied the existence of the relationship at all. This case received significant coverage in lesbian and gay publications, including the NSW based *Lesbians on the Loose*. It emphasised, and as is evident in Jen and Jenny's interview continues to highlight, the vulnerability of same sex relationships in law. The list of indicators available to the court through the PRA then, would appear to ease this situation somewhat by guiding what should be an impartial judiciary on how to 'find' a same sex relationship.

In function however, it does not appear that this is the outcome of s.4(2) in the PRA. Whilst acknowledging the intended non-exhaustive nature of this list, I contend it has a more determinate nature. Specifically, it appears that it is not simply the *presence* of some of these factors that determines that a relationship *did* exist, but it is also the *absence* of certain elements on the list that may determine a relationship *did not* exist.

The specific absence of certain characteristics listed in s.4(2) has been used in court to determine that a relationship did not exist. This claim comes from analysis of judgement made by Windeyer J in the case of Hooper v Winton (2002). The case involved a claim made under the PRA, which involved determining whether two men had been in a de facto relationship at the time of the defendant's death. Although I do not want to get into the merits of either the plaintiff or the defendant's claims, I do want to look at the particular points of judgement that determined a de facto relationship did not in fact exist. The judgement acknowledged that the relationship between the two men variously satisfied parts (a), (b), (c) and (i) of s.4(2) of the PRA: the two men had lived together for 15 years, were considered by many friends and acquaintances to be 'together' and had, he acknowledged, been sexually involved with one another. These factors however, were superseded by a number of other determinants that were judged *not* to be present: "the parties did not share a bedroom"; "there was no joint acquisition of property and the deceased was possessive of his own property" and "I am not satisfied that there was mutual commitment towards a shared life" (Windeyer J at 35). Without analysing the other factors in the judgement, the list clearly does not only serve to establish the *existence* of a relationship, but also to ascertain the *lack* of a relationship. In judicial translation, the list appears more definitive than its presentation in the legislation itself.

Given the precedent of interpretation made by Windeyer J regarding the use of the list provided in the PRA, I would argue that this list is specifically prohibitive in determining a lesbian relationship. Given responses from the interviews, and various other data, I contend that lesbian relationships have a higher potential than other relationships to score low on indicative factors listed and high on an absent indicator list. Taking each aspect in order, I will qualify this judgement.

(a) the duration of the relationship

The PRA requires that a co-habiting relationship have existed for a minimum of two years for a de facto relationship to be found. This was one of only two categories listed in s.4(2) that all the interview participants fulfilled. Duration of relationships discussed in the interviews ranged from less than 5 years (i2) through to 21 years (i4). Although this seems quite a straightforward criteria I would contest that this is not necessarily so. Similarly I would contest that the duration of a relationship is not necessarily an apt

reflection of the commitment or intention of longevity expressed by the women in these relationships.

The advertisements recruiting participants for these interviews read: "Long Term Lesbians Wanted! Are you in, or have you been in, a long term lesbian relationship?" The definition of such was deliberately left to self-interpretation, which led to a diversity of relationship types and durations being presented. The reportage of interviewees regarding the longevity, the measure and the commitment levels of relationships, suggests that the criteria of duration is not as straightforward as it may appear. For example, the women interviewed measured the duration of their relationships from various points of reference- from the start of a friendship; from the start of a physical relationship; from the time they bought a house or 'moved in together' or from the date of a commitment ceremony. Often, multiple time frames and dates discerned the relationship period. For example Jo and Sarah measured the start of their relationship from two points- the time of realisation that they were in love and the time of their commitment ceremony. Sand could also date the timeframes of her relationship from friendship through to a partnership through to the purchase of their house together which brought with it a new sense of commitment. These responses indicate that the perceived nature of relationship duration, is subjective and multiplicitous in nature. Further, the self-measure of a long term relationship (long term being both a current description and an indicative intention) relied more on emotional and non-legal factors (such as a commitment ceremony) than on a co-signed lease or mortgage. This lies in stark contrast to the two-year cohabitation measure that the majority of the PRA is held under.

(b) the nature and extent of common residence

This second factor was the other point at which all of the interviewees would have qualified under the PRA if a judge were to ascertain whether or not their relationship existed. However, contention would be possible in some cases. Jo and Sarah for example, lived in a house owned solely by Jo. They were saving for a deposit on a jointly owned house at the time of the interview. Were their relationship to come under judgement, in the absence of satisfactory documentation (there was no lease) or uncontested attestation to their relationship (both families took a significant amount of time to acknowledge the relationship), this could be interpreted as other than indicative of a relationship. The PRA was specifically articulated in parliament as being non-

inclusive of what were termed "flatmate" arrangements (Chapter Five).¹²⁴ At various stages of their relationship then, Sand and her partner would also have had difficulties proving their relationship under this identifier since their first experience of living together was within a group house situation: "We were living together but with one or two others for... the first year or eighteen months or something." In this situation there is difficulty in knowing whether or not a judge would read this as a relationship involving co-habitation, or a flatmate type arrangement. Although the Act itself does not contain a definition of such a term, it exists by virtue of what it is not. Using the wording of the Act, if two people are found *not* to be in a de facto relationship there are only two options of definition- the flimsily rights laden domestic relationship and failing that, the assumption of no relationship at all- that of flatmates. This is a particularly worrisome aspect of definition considering Jo, Sarah and Sand's examples.

Of course, such a definition also assumes that a relationship involves co-habitation at all. The NSW Anti-discrimination Board noted in their submission to the review of the PRA that "(i)ncreasingly, cohabitation is a less reliable or common indicator of the existence of a de facto relationship" (2002). In the opinion of the authors, this is particularly so for lesbians and gay men who may face undue discrimination if they cohabited and in the case of gay men it was posed that the "reduced likelihood" of parenting (and therefore joint care of a child) meant that some couples did not see cohabitation as necessary for a relationship. In Chapter Four I gave the fictitious scenario of Ramona and Sylvia whose long term relationship did not involve cohabitation, to suggest the limitations of the PRA. Although fictitious this scenario is not drawn from the abstract. In her speech at the NSW Law Reform Commission's Discussion Forum on Relationships and the Law (7 July 2000) Hayley Katzen, co-author of *The Bride Wore Pink*, articulated a very similar situation drawn from her personal experience:

Jen is my partner of three years. Our relationship fits most of the criteria defined in the new legislation. But in some ways we do not fit. We each own our own homes which are two hours drive apart, our common residence is limited to the few days a month when we spend time together. We are financially independent although we help each other out when needed. According to the law, we do not fall within the definition of de facto relationship (<<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/seminar01.02>>).

¹²⁴ The first reading speech in both houses of parliament read: "there is no intention (in the PRA) to create rights and obligations between persons who are merely sharing accommodation as a matter of convenience, in the way that flatmates might." (Shaw, NSWLC 13/05/99 at 229; Whelan, NSWLA 26/05/99 at 535).

Similar experiences can be found in other studies of lesbian relationships. Veronica Grocock's study for example, makes a number of references to long term partnerships where cohabitation was not a characteristic. She comments of those she interviewed: "At the time of writing, more than half of my interviewees were in long-term relationships. Not all live with their partners, and those who lived separately did so mostly out of choice rather than necessity" (1995: 55). Her interviewees reported a number of reasons for living separately including work priorities, the desire for personal space and illness (1995: 56-60). In some cases either one or both women had moved house to be deliberately close (in a geographical sense) to one another. Kim for example, reported: "On 1 July 1994, I moved into my own one-bedroom Georgian flat, which is not too far from where Janie (her partner) lives" (1995: 103). There is a sense of mutuality and commitment in such a move that in many ways parallels the move from two residences into one in the instance of cohabitation and yet, this is unrecognisable to the court through the usage of the PRA. Having established this however, what is also worthy to note is that co-habitation, although an essential *criterion* of a same sex relationship,¹²⁵ is not a key *indicator* of the same as is illustrated in the case of Hooper v Winton (2002) discussed above.

(c) *whether or not a sexual relationship exists*

The PRA permits acknowledged same sex relationships, those not contested by a partner or, in the case of intestacy or the incapacity of a partner, the partner's family, to exist more freely in a court. In some cases the iteration of the court that a relationship does exist is overt and serves to reinforce the relationship's legitimacy, or to create it in the Foucaultian sense. In Mair v Hastings (2002) for example, Macready J declared the existence of the relationship, its duration and its sexual nature as "quite clear" using the categories under s.4(2) of the PRA. However, finding a relationship is not always straightforward and since lesbian sex has historically been non-existent in legal definitions, this is potentially a difficult category to prove in court. A number of measures have been used to determine a sexual relationship in court cases involving lesbians and gay men, not all of which could be judged as objective. Winder J, for example, has judged whether or not a plaintiff's testimony of sexual encounters with the

¹²⁵ Under the PRA people must co-habit for a period of two years before a relationship can be said to exist in the majority of Acts that it covers.

defendant is believable, in Hooper v Winton (2002). In one instance it is considered such, and in another it is not. The lack of a common bedroom between the plaintiff and the defendant is also a point that contributes towards the finding of no relationship.¹²⁶ Similarly, in finding that a relationship did exist between two men in Devonshire v Hyde (2002), Macready M relied on the following: "It was his (friend) evidence that he saw the deceased and the plaintiff sharing the same bedroom and the same bed. He had seen them in bed together." The relationship was found, at least in part because the men had been seen to share a bed and therefore were presumed to have had sex with each other.

Given these measures, many of the interviewees would find it difficult to prove a sexual relationship, the majority of whom maintained separate bedrooms when cohabiting. As one respondent suggested, a common perception of such arrangements is the lack of a sexual relationship: "...[people think] ooh, don't they do it?" (i1) There are two points to be made about this. The first is the fact that a lesbian relationship need not be a sexual one, according to self measure. A number of studies and historical works (Moore, 2001; Grocock, 1995; Rupp, 1990; Faderman, 1985) have indicated that many women who consider themselves to be in long term lesbian relationships, do not have sexual relationships, have sexual relationships that have since passed, or have infrequent sexual activity with their partner.¹²⁷ The second point to make is that the maintenance of separate bedrooms is a distinct characteristic of many lesbian (and gay) relationships. As Jack explained, there is often a political significance to the maintenance of separate bedrooms that has to do with the space for individuality that lesbian feminist politics encourages.

The existence of a common bedroom has been used in courts to argue for the existence of a lesbian relationship. In West v Mead (2003) the following statement was submitted to the court which found a relationship to have existed: "(the women) occupied the main bedroom of the dwelling on the relationship property and slept with each other in the same bed of the main bedroom of the dwelling on the relationship property". The measure of sexual commitment and longevity being brought to rest on a common

¹²⁶ The sharing of a bed when staying with friends was not considered satisfactory evidence.

¹²⁷ This is not to de-sexualise lesbians, or to draw on any stereo-type of 'Boston marriages' or the like. It is rather, to draw on the diversity of experience that women individually consider to be a lesbian relationship.

bedroom, has distinctly heterosexist overtones of the 'marital bed' and may prove to be highly inappropriate to a number of people attempting to prove their relationship under the PRA. When the women in the interviews speak about their separate bedrooms, they speak of them as a defining feature of the structure of their relationship. Patricia for example, stressed the importance of the separate bedrooms she and her (then) partner maintained in their house was such that it influenced the type of property they purchased and the type of relationship they maintained. She said: "I am not a joined at the hip type of person...(having separate bedrooms was crucial in maintaining) a definition of self in a relationship." She gave further indication along the same lines as Jack, that this was a commonality of many lesbian relationships: "...I find it very unusual in a lesbian relationship these days if... if they share a room and I could probably count on one hand the number of couples that I know that do that..." What these comments indicate, is a defining, modelling and understanding of relationship that contradicts the 'style' of relationship that a court is used to dealing with. The maintenance of separate bedrooms is defining of a relationship rather than the opposite assumption that a court appears likely to make. This is reminiscent of Millbank's argument discussed above, that the court often has trouble 'seeing' lesbian relationships, and illustrates one of the many problems in simply extending a legal definition of relationship to include lesbians, which the PRA has done.

This discussion of course assumes that a relationship facing court finding is sexual in a specific monogamous way or sexual at all. I am reluctant here again to make generalisations about lesbian sex- sexless lesbian relationships, teetering on stereotypes of romantic friendships or lesbian 'bed death' and at the other extreme the equation of lesbian with sex, both of which are unhelpful stereotypes in the majority of instances. Without generalisation however, there are a number of pertinent points to be raised. The first of these is the historical and political context within which lesbianism has been constructed in the past twenty years. There is extensive literature (mostly in the form of critique) of radical lesbian separatism and lesbian politics, which have delineated lesbian sexual activity markedly from heterosexual sex. This has occurred in two distinct ways- through a de-emphasis on penetration and sexual activity at one end of the scale and a call for practices of non-monogamy and a variety of other non-traditional sexual practices such as Sado Masochism (S&M) at the other. Veronica Grocock for example, details lesbian relationships from her interviews featuring both

types of sexual practice and their explicit linkage to lesbian feminist politics. One of her interviewees describes "(p)assionate celibacy" as "the choice to be without a sexual partner for positive reasons of personal, political or spiritual growth...(it) allows women to define themselves autonomously." (1995: 56) Still relating her choice of sexual practice to lesbian feminist politics, another of her interviewees alternatively described "an ongoing non-monogamous lifestyle... (in) a committed relationship dating back to 1973" (1995: 59). Although not extrapolating lesbian sex or sexuality from these individual responses, it is important to emphasise the diversity that does exist. Similarly, important to note is the fact that both these examples are specifically linked through the narratives of these women to lesbian specific political beliefs. As such neither sexual practice is likely to be the type of "sexual relationship" referred to in the PRA.

Such an assertion is linked to the second consideration that needs to be made relating to the constructed invisibility of lesbian sex and sexuality within legislative systems. Using the American example, Ruthann Robson discusses the various ways in which lesbian sexual activity is rendered visible or invisible based on legal statutes. She argues that the traditional notions of penetration and genital contact that legal codes have relied on to discern 'sex' are not necessarily applicable to or descriptive of lesbian sex (Robson, 1992: 50). Within the Australian context these assertions remain appropriate-lesbian sexuality has never been criminalised nor given a specific age of consent in Australian law. Unlike gay male sex which has been articulated in numerous and detailed fashions through sodomy, buggery and age of consent laws, lesbian sex has remained unarticulated. Although I do not want this discussion to collapse into a post modern critique of language, I believe that the lead of authors such as Judith Butler, who has argued that lesbian sexuality is 'unthinkable' (1993: xi) is insightful here. What the PRA asks a judge to find is an historically unthought legal fact. To find lesbian sex in order to find a relationship, is to either create a legal category that has traditionally not existed, or to employ some other standard of sex and sexuality (by making analogies between gay male or heterosexual sexual activity and lesbian sexual activity) to discern it.

Findings under this category of the PRA rely on an ability to articulate a same sex sexual relationship in court and on the ability of that articulation to be accepted as

evidence. Extremes of this can be found in cases that have used the PRA. In Devonshire v Hyde, for example, Macready M relied on very public means for discerning a relationship:

There is sufficient evidence, for example photographs of them together, to satisfy me that the plaintiff and the deceased had a sexual relationship while living together

and later:

It was his (friend) evidence that he saw the deceased and the plaintiff sharing the same bedroom and the same bed. He had seen them in bed together.

One of the primary reasons that same-sex sex may be difficult to find in a court is the legal linkage of homosexuality to the private sphere. Prior to the gay and lesbian liberation movements in Australia, homosexuality was predominately a closeted affair, rendered to the private sphere through police raids on clubs and bars and dances as well as through the illegality of gay male sex (Willett, 2000: 3-18). Various from this time, laws and legal systems have acted in a number of other ways to maintain this privatisation of gay and lesbian sex- the persistence of sodomy laws until the 1990s (Willett, 2000), court judgements requiring lesbian couples to refrain from indicating their lesbian sexuality to their children (Bateman, 1992) and general anti-homosexual policing (Willett, 2000; Joyce, 1998) as examples. Heterosexual marriage laws by comparison, sanction heterosexual sex explicitly. A marriage for example, could (prior to no fault divorce laws) be declared void if the marriage was not consummated, and a refusal to engage in sexual relations with a partner has historically been an acceptable reason to apply for divorce (Brook, 2004). The precedent of courts being able to discern and describe heterosexual sex is established to a far greater degree than is the ability to discern and describe gay or lesbian sex (at least in any positive manner).

(d) the degree of financial dependence or interdependence, and any arrangements or financial support, between the parties

Although significant literature exists regarding the interdependence of finances within heterosexual relationships, little similar research has been conducted on same sex couples. In one early report in 1978 Donna M. Tanner reported that the trend in lesbian relationships seemed towards the maintenance of separate bank accounts and split bills

(1978: 72).¹²⁸ This finding is one similar to those of this study. The majority of interviewees maintained separate bank accounts as well as a joint one.¹²⁹ The joint account was used to various ends from shopping through to mortgage repayments. However, the use was not uniform for example, two couples discussed the fact that grocery shopping was paid for by whichever partner did the shopping on any given day (i2; i4). Another interviewee however, spoke of her distaste for grocery shopping and her partner's enjoyment of the same, and hence the importance of the joint bank account so that both could contribute financially although only one of them actually shopped. The sense of equality and fairness with regards to finances was an interesting discussion point in the interviews. Equality tended to rely more on the ability to spend money than to contribute it. I mean by this, that the contributions to shared bank accounts, household upkeep and the like were not necessarily shared equally in a dollar for dollar sense. The ability of each partner to spend these common finances however was equal.

The weight of importance of separate bank accounts however, was also discussed. The ready interdependence of finances was not necessarily the most desirable option of finance organisation. For example, Jen and Jenny lived in a jointly owned house and had done for over a decade. At the time the of purchase however, the women presented themselves, and the documents were drawn up as, two single women buying property together rather than a lesbian couple buying their joint home. In part this was circumstantial in terms of the period (late 1980s) in which they made the purchase, when the legal and social recognition of lesbian relationships was much lower than current standards. In part the decision was likely influenced too by the closeted nature of their relationship at the time. They discussed their early reluctance to make their relationship public, and their experiences when first living together in a small country town, where they 'passed' as housemates. The women however, also discussed a third, and possibly the most motivating, factor of influence in their manner of property purchase- financial independence. In the mid 1980s, the women met a lesbian couple who were in the process of ending their relationship. This couple experienced

¹²⁸ Although a dated study, Tanner's work was upfront in critiquing the majority of studies done to that point on lesbian relationships which had assumed a butch/ femme stereotypical dynamic to all lesbian relationships, keeping it in line with more modern understandings of lesbian relationship dynamics.

¹²⁹ One couple merged finances very early into their relationship. They maintained a joint credit card that was used for all the household payments: "Our finances are all jointly organised...we don't split anything." (i5).

significant problems separating their finances and the interviewee women took this troubling situation as one to avoid wherever possible. The women suppose that witnessing this was influential on the ordering of their own finances in the relationship. Each woman maintains her own bank account, and relative financial independence from the other. Their joint bank account, which was only set up when they purchased their home a significant number of years after they first began living together, is still in tact although the mortgage is fully paid. The account is only used to pay the household bills. During the interview, the women stressed the importance of their financial independence, although they acknowledge that it is not something that they often think about these days, nor is it something that they talk about — after 21 years, the system is just given to work and suit both women.

Again, this characteristic of separate finances was seen by the majority of interviewees¹³⁰ to be characteristic, definitional and resultant of their lesbian relationship. Speaking about ending her long-term relationship, one woman indicated that separate finances were an essential element that made had the process fair. Whilst together, the women had kept separate bank accounts as well as a joint one. When purchasing their house, the women drew up a (non-binding) legal document that dictates the percentages of payments made and corresponding percentages to be taken away on the sale of the house should their relationship end. What this separation of finances meant, according to the woman interviewed, was a sense of financial certainty and equity, and a lack of financial contestation when the relationship ended: "We have both become financially independent and autonomous (at the conclusion of the relationship)" (i3).

Alternatively, joint finances seem to characterise heterosexual relationships, particularly in the case of marriages and long term de facto relationships. Supriya Singh uses the term "marriage money" to describe this phenomena arguing that: "(m)arriage money is domestic, private, personal, joint and nebulous. Jointness is central to the meaning of marriage money" (1997: 83). Through her study of heterosexual relationships Singh argues that the focus of joint finances is such that only two couples in her interviews

¹³⁰ Anne and Mary were an exception to this. Their finances were "all jointly organised" from about the first year of their relationship.

maintained separate bank accounts as well as joint ones (1997: 44). She further argues that the formation of joint accounts is something that is taken for granted as a part of a relationship, particularly a marriage:

(i)n Woodville it is taken for granted that the joint account follows marriage or the commitment to marry. Couple after couples talk about it in ritualised terms, describing how, soon after marriage, they went to the bank together to change all or some of their separate accounts to joint accounts (Singh, 1997: 43).

This demarcation of emphasis between independent and joint finances found in heterosexual and lesbian relationships, although based on small scales, is at least suggestive of problems with the PRA. The "degree of financial dependence or interdependence, and any arrangements or financial support, between the parties" appears unlikely to describe a number of lesbian relationships. Indeed it may be another characteristic of the heterosexism contained in the PRA as a category better suited to finding heterosexual relationships than lesbian relationships.

(e) the ownership, use and acquisition of property

As the title of the Act suggests, provisions for the division of property upon either a relationship breakdown or the death of a partner is key to this new legislation. Each couple interviewed in this study co-habited however, not all couples shared the ownership of the house in which they lived. Jo and Sarah for example, lived in the property owned in full by Jo. They were however, striving to save a deposit for a house together. They spoke of putting aside small amounts of money whenever possible and laughed as they told me that they considered the process to be one of buying their future house brick by brick. There are two key points to raise in relation to this, both of which revolve around the perception of shared resources despite single ownership. Jo stated that although legally she solely owned the house, she very much perceived it to be their joint home. The financial considerations of the house were not as great as the emotional symbolism of their home. I do not want to sound naïve here- the necessity of property laws derives from the acrimony that can arise when a relationship disintegrates. The cases of Hammon v O'Brien (1990) and West v Mead (2003) discussed above are indicative of this situation. However, not all lesbian relationships end acrimoniously. Further, the PRA is not solely designed to make decisions about property in such situations- but also to decide issues of property division when the relationship ends through the death of a partner. It is entirely possible to imagine in this instance a

situation where the home is simply that as an understanding of the relationship that meets an untimely and unavoidable end. Without accurate documentation (such as a will) however, precedent has indicated that courts may be unable to see the relationship and therefore, will not be able to consider the agreements made between the people in that relationship about the co-ownership of the home.

The second point to raise in relation to Jo and Sarah's home is the intent to co-own a house that was an understanding of their relationship. Again, this intention and understanding of the relationship is not likely visible to a court and almost certainly would not be considered in the finding of a relationship under this particular category.¹³¹ If we return to my earlier supposition that lesbian relationships socially hold the potential to be the least economically secure type of dual relationship then there are particular limitations to this category for finding a relationship. The economic rendering of lesbian relationships may make them particularly difficult to find under this category despite the aspiration within a relationship for joint ownership and acquisition of property.

There is also something interesting about the co-habitation patterns of the women interviewed in this study, which are gradual, often piecemeal, and changeable in nature. For example, one couple discussed the necessity of maintaining separate residences whilst one of the couple was studying (i2). They had been "living together full-time" for three years "and a couple of months...", had co-habited for half a week at a time prior to that, and even prior to that had co-habited on weekends. And yet, both women agreed that they knew they were in a long term relationship from the time they first entered it. Had these women needed to prove their relationship based on co-habitation at any time prior to their full time living arrangement, they would not have satisfied the co-habitation rule of the PRA and may have had difficulty satisfying the definition of common property usage. As I have discussed earlier, other studies have indicated that these patterns of co-habitation are not unusual in lesbian relationships.

Another woman spoke of the nature of her (then) partner's work as necessitating significant and repetitive periods away from home. She also discussed a separation of

¹³¹ It may however, be considered under "(f) commitment to a shared life".

living arrangements at one point in time that did not correspond with a separation of the relationship (i3). Mahoney JA has held that some physical separations of living arrangements do not indicate a legally intended end to a relationship (Hibberson v George (1989)). This is a case point that has been upheld in a number of other hearings. However, in order to accept evidence that a relationship continues despite a couple not cohabiting, there must first be evidence that a relationship has indeed been held to exist. This is the point of contention that many of these women would be negotiating should they have to prove their relationship under the PRA.

(f) the degree of mutual commitment to a shared life

In the absence of any other indicative factors, this is a fairly abstract concept upon which to base judgement of a relationship. The norm in this category is to rely on legal or material based evidence rather than on testimony alone. Each interviewee expressed throughout her interview, an intention of continual and mutual commitment to the relationship. Each spoke of the current relationship as a primary relationship and gave no indication of sexual or intimate partners concurrent with their current partner. However, the expression of this commitment was most often expressed in emotional rather than public or legal ways. For example, the majority of the women had not made wills that provided for their partners or declared the existence of their relationship. The majority did not have documents naming their partner as next of kin or power of attorney. The decision of Winder J in Hooper v Winton (2002), above, illustrates that such legal documents carry great weight in judgement, and in this particular case, trumped competing claims about the relationship's mutuality described by witnesses for the plaintiff.

In two cases involving s.4(2) of the PRA, the intention of commitment between two (heterosexual) people has been declared through marriage proposals (Aranas v Berry (2002)), an engagement and the planning of a wedding (Nelson v Brennan (2002)). It could be expected, given this, that one couple, Jo and Sarah could use their commitment ceremony as evidence of a similar commitment intention should their relationship be questioned under the PRA. Jack spoke of an increasing trend in commitment ceremonies being held by her lesbian friends. Although not legally binding, such ceremonies could be expected to hold weight in a court of law, if an engagement, which is also not legally binding, is held to. Indeed, in Devonshire v Hyde (2002), the

commitment ceremony between two men was used in evidence for finding a same sex relationship under this subsection of the PRA in the case of a contested will. However, as research has demonstrated, the nature of same sex commitment ceremonies differs vastly from couple to couple who choose such an avenue of recognising their relationship. Indeed Suzanne Sherman (1992) has illustrated that although some of these are public ceremonies witnessed by friends, families, and religious or spiritual groups, so too are many of these ceremonies a very private affair. In the absence of public recognition, such ceremonies provide personal, but not legal evidence of a relationship.

Similarly, as some people may choose private commitment ceremonies, others choose not to participate in such ceremonies at all. After describing a number of lesbian commitment ceremonies she had witnessed, Jack spoke of her discomfort with the notion. The choice not to participate in a commitment ceremony can be a political decision. Jack's discomfort in part stems from the mimetic nature of these ceremonies to heterosexual marriage and her lesbian feminist beliefs that sit uneasily with the idea of sexual contracts. This collapsing of lesbian relationships into pre-defined notions of relationships is evidenced by the case of Devonshire v Hyde (2002)- in an interesting note Macready M referred to the commitment ceremony presented in evidence as a "marriage ceremony". Although on the one hand this reference gives significant weight to the ceremony, it also holds the possibility to significantly misrepresent same sex commitment ceremonies, to de-politicise and to redefine them or to "domesticate" them, as Ruthann Robson has contended (1992: 19).

I suggested in discussion of the previous category, that combined finances may also provide some evidence of commitment to a shared life under the PRA. This has been used in a number of cases both prior to and after the passage of the PRA. In Bell v Elliott and Anor (1995) for example, evidence to find a lesbian relationship and to decide on provisions in the case of intestacy included a bank loan taken out in both women's names. This money was used, amongst other things, for the maintenance and improvement of their home. Similarly in Mair v Hastings (2002) loans between two partners appeared indicative of a relationship. Macready M found: "(t)here were loans, for instance from the plaintiff to the deceased so there was quite a degree of interdependence in respect of financial support". In this case the findings instructed that outstanding loans be paid for through the deceased estate. Although both of these cases

support the finding of a same sex relationship it is important to refer back to the data of these interviews discussed above. Specifically important to remember is the fact that financial autonomy is often times characteristic and defining of these long term lesbian relationships. The extent to which this category can be utilised in proving a lesbian relationship in court then is necessarily questionable.

(g) the care and support of children

Literature regarding the parenting of children by lesbians indicates that this is an increasing trend. Jenni Millbank for example, cites studies indicating "that between 15-20% of lesbians have children" and "that this proportion is likely to increase in the next 5 years" (2002: 6). In a relative sense then, this indicator is likely to become a corresponding increasingly important one. Although I contend this however, it must be stressed that this increase does not necessarily equate to an increasing accessibility to recognition of lesbian relationships through the PRA. The issues of co-parenting¹³² and lesbian step-parenting¹³³ are particularly vexed ones in Australian law. Under NSW law there is no automatic legal acknowledgment of a lesbian co-mother,¹³⁴ there are no provisions for a co-mother to be placed on a birth certificate as a parent of their child,¹³⁵ nor are there legal processes that allow for lesbian step-parent adoptions. A lesbian parent who has no biological relation to her child, must apply for a parenting order from the court should she wish to have legal decision making capacities for her child and these are available to any person who can prove that they have a major role in the care and welfare of a child. Should a woman in a lesbian relationship need to rely on her role as a parent to a non-biological child in order to prove her relationship then, she is in a potentially precarious situation.

There are also precedents in court hearings that indicate the potential difficulties that same sex families may face when trying to be seen by the court. In Mair v Hastings (2002), when finding a de facto relationship between two men, Macready M listed

¹³² I am using co-parent here to describe a woman who is an intentional parent, a consenting party to the decision to have a child.

¹³³ I am using lesbian step-parent here to describe a woman who assumes parenting responsibilities of a child already born to her partner.

¹³⁴ In the case of marriage, whether he be the biological father or the intentional father as the result of an anonymous sperm donation.

¹³⁵ As is the case in Western Australia, the first jurisdiction in the world to allow two parents of the same sex to register as parents on a single birth certificate.

under this point: "There are, of course, no children." This was more than a statement of fact- it was rather, a presumption of characteristic. '*Of course* this is a same sex relationship so there are no children of the relationship'. Millbank cites American statistics suggesting that about 10% gay men are currently parents (2002: 21). Macready M's "of course" however, threatens to make this significant number invisible through the presumptive heterosexuality of parents. Within the court system, lesbian parents may find a different level of visibility if for no other reason than the history of lesbian mothers in court cases (historically when the suitability to parent, based on a woman's sexuality, is being contested by an ex-partner who is a man). In West v Mead (2003) part of the evidence in finding a relationship between two women was the following description:

On 21 March 1987 Ms Mead gave birth to a son, Joel. Ms West was at the hospital at the time of Joel's birth, and held him within minutes of his birth. He was brought home to live at the relationship property.

The immediacy of the non-biological mother in this case is described in a similar role that would be expected of a biological father in a heterosexual relationship. The image indicates an association of parentage and the court articulates the relationship of the non-biological mother as a co-parent. In this case, the court was able to 'see' the lesbian family and employ it to find a relationship.

This category however, is not useful to the majority of women in same sex relationships who do not have children. In this study there was only one instance where an interviewee had a child, and that child was now an adult and not a child of the relationship she was discussing (11). All the other respondents did not have children. Patricia discussed her desire to but ultimate inability to conceive a child. Others spoke of the ways in which prohibitive laws had influenced their decision not to have children within their lesbian relationships. Anne, for example, spoke of the disincentive to raise children in a lesbian relationship posed by adoption laws. Jen and Jenny also suggested that laws had played a similar disincentive. They said that early in their relationship they did not believe having a child within a lesbian relationship was possible. When they realised it was, despite prohibitive laws, they felt their time had passed to become parents. In these cases, laws that act to exclude lesbians or to render them invisible, such as In Vitro Fertilisation (IVF) laws, adoption laws, and non-presumptive parenting rights for non-biological co-mothers, have influenced these women's decisions about

parenting. Further, prohibitive laws also exclude these women from being able to satisfy this indicator of a de facto relationship.

(h) the performance of household duties

Relationship cases heard in court have, historically, relied heavily on the onus of household labour indicated through the division of household duties. This harkens back to notions of the traditional nuclear family and the division of the public and private spheres where men work (in the public sphere) and women keep house (in the private sphere). Divorce cases in particular, and heterosexual de facto relationships after that, have made correlations between domestic duties and paid work (Dunn, 1998: 12-13) and have highlighted the fact that domestic duties performed by a non working partner enable a working partner to do so. As such, domestic labour has been used traditionally to find a 'good wife' in court, deserving of financial retribution upon the dissolution of a relationship. The second reason key use of household duties within court cases is to indicate a level of interpersonal care between two people. This on its own however, would be more indicative of a 'close personal relationship' than a de facto relationship in the case of the PRA, defined by the provision of "domestic support".

The division of 'household duties' in each of the interviews was described as an equitable split, based on varying criteria: sometimes one woman cooked dinner and the other would wash dishes, one liked the other's cooking better than her own so she tended to take up other responsibilities, sometimes it was based purely on whoever had the harder day at work being exempt from cooking. There were trade offs for likes and dislikes, time constraints and abilities. Sand for example, said:

We're very domestically compatible which is a real blessing in the relationship. There's things like...like [her partner] does most of the garden stuff and I do things like look after the car primarily...and make sure the bills are paid on time. But things like the dishes...and cleaning, it's very even.

Two points that the women raised about such work was that there were no attempts to maintain gendered housework roles, and the conversations about who did what were virtually non-existent. This is similar to findings in other studies of lesbian relationships and the practice or ideal of egalitarian¹³⁶ splits of domestic labour (Tanner, 1978;

¹³⁶ I am not advocating here, an interpretation of lesbian relationships as egalitarian- I believe this is not a useful concept. For critiques of this notion see for example: Vickers (1996); Reilly and Lynch (1990).

Koepke et al, 1992; Huston and Schwartz, 1996; Dundas, 2000; Patterson, 2000; Jeffreys, 2003). Peplau (1982) suggests that the lack of gendered and sexual scripts, or patterned modes of behaviour can explain this egalitarian style of relationship in the case of same sex partnerships. Whilst not wanting to place the onus of egalitarianism on lesbian relationships, an emphasis on equal responsibility within relationships is a repeatable pattern that is noteworthy. If for no other reason it is such because it stands in contrast to the traditional patterns found in heterosexual couples and hence the reason household duties have traditionally been incorporated into court cases. It thus raises questions about whether these patterns would be 'seen' by the court and moreover, whether they would contribute to the finding of a relationship. Precedent indicates that this would be the case in both instances, although the weight of evidence provided by this category is somewhat light. As Macready M said in Devonshire v Hyde (2002): "the requirement would be met if the parties shared accommodation together. For example, a boarder in an elderly woman's home would qualify." Such a statement indicates that shared housework does not necessarily indicate a relationship within a court setting.

(i) the reputation and public aspects of the relationship

Given various problems of invisibility related to closeting and safety fears surrounding public displays of affection experienced by some lesbians and gay men, such a category is a distinctly difficult one for many lesbian relationships to meet. In Grocock's study for example, many of the women interviewed expressed at least some element of closeting in their relationship- at work (1995: 99;104), from families (1995: 94) and the wider community (1995: 72). This is a pattern that appeared to hold in many of the interviews conducted in this study, ranging from relatively minor elements through to almost complete closeting of a relationship. Jen for example, described the extent to which her relationship was concealed from the small community in which she had previously lived. She told me that she and her partner had passed as housemates until they moved to a larger (although still small) town. In their new town they were cautious about outing themselves, but did not deny their relationship when asked. It would appear that the category of reputation would be a difficult one to satisfy in finding a relationship. Moreover, this category is difficult to satisfy specifically because the relationship is one between two people of the same sex.

Obviously, not all same sex relationships are closeted ones. Patricia for example, told me that "in terms of my family...she [her partner] was pretty much a family member. She got on with my dad real well." Similarly, Jack and her partner co-owned their property with her mother and shared things such as meal times, food preparation and shopping. There cannot be an assumption then, that families in particular, or friends and communities in general will not acknowledge a relationship should it be called for in a court setting. However, this does not negate the fact that people in same sex relationships can face a greater incidence of non-recognition and acknowledgement from these people that a heterosexual couple are likely to face.

Given the purpose of the PRA to account for lesbian and gay relationships however, there is evidence that its interpretation can be mindful of the specific tendencies in nature that may be found in such. For example, Macready M in Devonshire v Hyde (2002) found in favour of a relationship existing between two men, by relying on the evidence of the surviving partner and others who had witnessed the relationship. This was despite the defence case, which involved testimony that no relationship had been witnessed. He found in part:

It is perfectly clear to me from the evidence that the deceased was careful not to disclose the existence of the (same sex) relationship to a number of people. In these circumstances it seems to me that (it) is appropriate for me to accept the plaintiff's evidence...

The apparent closeted nature of the defendant in this case, was not held as sufficient evidence that a relationship did not exist. Assuming a relationship is not totally closeted by both people in the relationship, and that others who have witnessed the relationship would be willing to testify to that effect, there appears some hope that this clause is not as devastating as it first appears. However, it should be noted that evidence declaring the lack of public knowledge of a same sex relationship, has a legal history (in Australia and particularly in the USA)¹³⁷ of outweighing testimony to the contrary. This is particularly the case when a family of a person in a same sex relationship does not acknowledge the relationship- either because they are not told, or because they refuse to believe, support or otherwise consciously disavow the relationship.

¹³⁷ See my earlier discussion of the Sharon Kowalski case.

7.5 Conclusion

Whilst the PRA broadened the legal definition of de facto to include same sex couples, it is not evident that a concordant rise in accessibility to court systems or judgements finding same sex relationships has occurred. There has been a markedly low use of the PRA to find same sex relationships and there have to date been no cases held under the PRA involving lesbian couples. Further, an analysis of the usage of the PRA under s.20 indicates that the likelihood of being able to find a lesbian relationship within the court setting may be prohibitive at worst, or significantly difficult at best.

This is in part because the PRA establishes categories of relationships that do not necessarily fit with the experience of lesbians. In this chapter I have argued that this is mostly a negative impact. In the following chapter however, I will frame these ideas in relation to the lesbian outlaw and argue that the reasons lesbians may be excluded from the PRA may be the same ones that enable lesbian relationships to develop independently of heterosexual stereotypes. Further, this has led to other patterns of relationship formation, including the dissolution of relationships that are not dependent on legal interpretation and intervention. This may also help to account for the significantly low numbers of lesbians specifically and same sex relationships more generally in cases using the PRA.

Chapter Eight

Outlaws and their Mortgages:

A Re-Take on lesbian engagement with the PRA

'Chloe liked Olivia', I read. And then it struck me how immense a change was there. Chloe liked Olivia perhaps for the first time in literature. Cleopatra did not like Octavia. And how completely *Antony and Cleopatra* would have been altered had she done so!... All these relationships between women, I thought, rapidly recalling the splendid gallery of fictitious women, are too simplistic. So much has been left out, unattempted. (Virginia Woolfe, 1993: 74)

8.1 Introduction

The chapter is a continuation of the previous one, based on the same series of semi-structured interviews with women in, or previously in, long-term lesbian relationships. The interviews asked a series of questions based on primary elements of the *Property (Relationships) Act 1984 (NSW)*, designed to elicit narrative type responses on how this piece of legislation, and the law in general, affected the every day lives of these women. The interviews aimed to elicit responses that could be used in a comparison between legislation as it appears in codified Acts and legislation as experienced by the people for whom it has been designed. The latter reading of law highlights well the contradictions inherent in the PRA that liberal democratic readings (such as equality and rights claims discussed in previous chapters) do not allow. This is because the PRA is experienced through and people in a lesbian outlaw subject position- women who are not wholly in, or out, of the law. The chapter examines the interview responses and examines the impact- real and perceived- of legislation and legal systems on the lives of the interviewees. It examines, with specific reference to the PRA, the uses and limitations of such legal systems that these women believe to be applicable to their lives and relationships.

The interviews demonstrate some instances of real hardship experienced because of inadequate legal recourse available to these women as lesbians. However, this legal invisibility has not resulted in a general feeling of helplessness. Quite to the contrary, legal invisibility for these women has often lead to the opportunity to negotiate their own quasi legal solutions to situations in a manner that both meets their direct needs

and reflects an individualised view of their relationships. Liberal democratic rationalities, which prompted the PRA, saw the silence of lesbians in law, as only a repression. However, silence is not discursively static. Based on this, the chapter argues that what has been a silence in law, has been chatter elsewhere (the outlaw position). It looks at the arrangements the interviewees have made in lieu of legislative aid prior to the PRA, and takes these outlaw solutions seriously. It argues that there are a number of non-legal and quasi-legal solutions to problems dealt with in the PRA (relationship break down, property division, etc) which the interviewees have employed/ developed not only prior to the PRA but irrespective of it as well. Legal solutions such as the PRA do not necessarily fit the needs and desires of an outlaw. Further, a general scepticism of the law, which these women articulate, often leads to a subversive relationship/ use of laws and legal systems that a liberal democratic reading of the PRA would not comprehend (for example the citing of the PRA in a commitment ceremony held in lieu of the legal right to marry). The chapter acknowledges that the interviews were conducted post-PRA and that any conclusions drawn are done so with the security of legal rights and recourse as an alternative. It concludes however, that the silence which the PRA sought to address was actually a lively and creative discourse, rather than solely a repression and that although certain experiences of repression and legal discrimination were real, they were not the entirety of experience. Further, it concludes that outlaw solutions may offer greater flexibility to the women who employ them and better fit the reality of experiences of these women than those proposed in the PRA.

8.2 Methodology

The previous chapter examined the extent to which the PRA was capable of recognising lesbian relationships through its definitions of de facto relationships and court precedents. It concluded that at best, the PRA could only offer partial recognition of lesbian relationships and that, at worst, it was incapable of recognising many of the specific elements that characterised lesbian relationships. Throughout this thesis I have argued that this is the case because of the liberal democratic discourse that produced the PRA- a discourse that cannot make account of contradiction. In this chapter I continue that exploration of the partial recognition offered to lesbian relationships under the PRA by rereading it as an outlaw position. A lesbian outlaw discourse reads contradiction (through the development of truth) and absence (represented as silence), such as is

offered by the PRA, in an enabling manner. It highlights reciprocal power relations and power/ knowledge constructions that are not mainstream (in this case represented by liberal democratic discourse and more specifically, law). The contradiction that arises from liberal democracy, in this case found in the example of the PRA, can be re-read and re-interpreted (Chapter One). In particular the women interviewed for this work had allocated specific meanings to these contradictions. The chapter will explore these other meanings and in doing so will offer other truths for consideration. In this chapter I will examine these other truths and the offerings that they may give back to laws and legal systems in Australia regarding the recognition of lesbian relationships.

The following sections then, aim to establish an outlaw position amongst lesbians affected by the PRA. If the conditions for outlaw discourse can be met, then the concomitant outlaw approaches to law can be juxtaposed with the in-law approach of liberal democracy. The effect of this contrast is to allow an examination of applicability, appropriateness and outcomes of each perspective as it relates to the PRA. Ruthann Robson emphasises the importance of understanding law not simply as a set of rules, but also as a symbolic code. This is an important distinction, which liberal democratic readings appear to ignore. Reading the PRA as 'equality', for example, focuses exclusively on particular Acts of legislation, particular 'rules' without reference to its broader existence within the symbolic. On a broader scale, as previous discussion has evidenced, the PRA establishes a distinctly contradictory symbolic self. Robson argues: "Regarding our (lesbian) relationships, the law's symbolism is often confusing, contradictory and pernicious" (1992: 119). What I want to argue is that the lesbian outlaw subject position sits in an uneasy and contradictory position with relation to legal discourse. I want to do this by adding a third level- that of the experience of law- to Robson's dual approach of reading law as rules and as a symbolic code. This experience will come directly from data collected in the interviews.

The chapter considers responses from the interviews that indicate the agency of lesbians in a lesbian outlaw subject position. That is, it examines the interactions of the interviewees with laws and legal systems and the effect partial legal recognition has on these. It then characterises these interactions as an outlaw agency.

8.3 Establishing the Lesbian Outlaw

To ascertain outlaw agency and discuss its applicability to laws and legal systems, I first need to solidify the argument that the lesbian outlaw subject position can be found in the interview narratives I am analysing. Although I am not advocating a reading of *all* lesbians as outlaws I do contend that the legal construction of lesbians, this time specifically marked by the PRA, produces a lesbian outlaw subject position through which individual lesbians experience and interact with the world. Similarly, I contend that through this construction particular power/ knowledge relationships develop lesbian outlaw discourse and facilitate the construction of truths. As such, individual lesbian's experiences become a marking point of power/ knowledge within lesbian outlaw discourse.

In order to establish an outlaw position amongst the interviewees, I will examine two key themes that arise within the responses and which characterise the lesbian outlaw-the simultaneous functioning in and out of legal systems, and the awareness of the contradictions evident in this situation. I will then contrast the understandings of life under the PRA resulting from lesbian outlaw and liberal democratic discourses to measure the accuracy and utility of each to legal theorising.

Omission as a tangible characteristic of the outlaw

A tangible characteristic of the lesbian outlaw subject position is omission from legislation as a lesbian (Chapter Two). I do not suggest that this is the defining limit of the lesbian outlaw, however, the complex relationship with legislative discourse involved in constructing the lesbian outlaw subject position is certainly marked by the absence of lesbian sexuality from written legislation. Omission from legislation was a theme common to all the narratives in the interview responses. When asked to discuss their understanding of the legislation, of their rights and recognition under law, interviewees were more than likely to answer with a list of omissions than with a list of enabling Acts. The absence of legal recognition was more pertinent than the recently passed 'rights' in the form of the PRA.

Omission from legislation was constructed in the interviews as both an act that was done to the interviewees and an act that they did themselves. It was not just that the

women were outlawed by legal systems, but that they also chose outlaw status themselves. Sarah, for example, told me "We don't really have anything to do with the law". In her opinion, legal systems were peripheral to her relationship. Similarly, Anne told me that other than purchasing her house and organising wills she felt that she had no interaction, as a lesbian, with the law. This is an understandably common perception for women who identify as lesbian. Australian history has provided very little legal reference (other than the occasional negative one) for lesbians or lesbian relationships. Women have formed same sex relationships in spite of legal omission or hindrance. This is in part, an option that has as its root, a type of rebellion as I have characterised of the lesbian outlaw in previous chapters. Jack illustrated this when she said:

Sometimes what I hear [working with and socialising with other lesbians] are lesbians being really angry that some of the rights groups are pushing for recognition of same sex relationships whereas they feel they get benefit out of not having that recognition.

In her opinion, many women preferred the outlaw position and its benefits in comparison to laws such as the PRA, which did not fit the experience of lesbian relationships as these women lived them. Omission in this case was the preferable choice for lesbian relationships.

Throughout the interviews a long history of the negative impact of lesbian omission from legislation was also traceable. Omissions from law had a variety of impacts on the lives of the women interviewed. The exclusion of lesbian couples from recognition in tax laws were cited in a number of interviews as having some of the greatest negative impact. Anne expressed her anger at this situation:

It really pisses me off the way married couples, certainly couples with children, can get tax benefits that lesbians certainly can't access...I do resent paying...you know my taxes ... benefiting heterosexual couples much more than it ever does lesbians.

Jo expressed similar sentiments as well as the negative impact it had had on her relationship. She discussed the prohibitive role omission had played in the construction of her relationship with her partner: "...it would have been to our benefit if Sarah was acknowledged as a dependent...when she was a student...(this) has stopped us merging financially..." When interpreted by federal laws, tax returns and student payment systems for example, the relationship between these women disappears- the law is again unable to 'see' the lesbian relationship. This omission itself does not mark the lesbian outlaw subject position however, rather, the implications of this omission- the impact it

has had on constructing the relationship are more the marker.¹³⁸ For ease of negotiating these federal finance systems, the women felt almost forced to structure their finances accordingly- as if their relationship did not exist. This meant maintaining separate bank accounts. It also meant that since Sarah was not a dependent under tax laws, Jo was taxed at a higher rate than a heterosexual partner, living under the same circumstances, would have been. As a couple then, it meant having to deal with financial penalty through longer work hours and various sacrifices such as not being in a position to co-own a house. Primarily, such omissions are an affront to personal agency and dignity. Omission from laws in this case however, also *constructs* aspects of the relationship and is therefore a tangible element.

The prohibitive omission discussed above, stems from direct contact with various laws and legal systems. Omissions discussed by the interviewees are tangible in the experiences of women as they engage with the legal system, but also as they construct and participate in their relationships. The legal system acts as a reference point for many of the women. This can be more tangible than it may imply. For example, Anne said: "We never had children. If the laws had allowed lesbians to adopt maybe there would have been a time when we might have looked at that." Similarly, Jen and Jenny's decision not to have children was made in relation to the invisibility of lesbian motherhood in laws at the time. Both women in the interview felt that their time for potential parenthood had passed and contrasted it to the increasing trend today for lesbian couples to conceive and raise children. Regardless of this (sometimes) legal possibility today however, Jen and her partner were childless because of past omissions from legislation as lesbians. These women did not have an opportunity to engage with the legislative system and yet, their omission from the legislative system has had an incredibly real and tangible impact on their lesbian relationship. What I find particularly interesting about this comment is the legal rationale given for the decision not to have children. Robson has commented on a similar situation of rationalising lesbian motherhood (1992:140). The law becomes a reference point for decision making

¹³⁸ As discussed in the previous chapter, laws of omission that prohibit certain patterns of coupling and cohabitation also have the potential for greater effect in other arenas. Jo and Sarah, for example, may have difficulty proving their relationship in court should they ever have the need, because the PRA suggests that financial 'merging' is characteristic of a *de facto* relationship. Not only do these women not satisfy the 'legal' vision of a relationship under this criteria, but it is so, because other laws prescribe it. In this instance the law plays a double role in prohibition.

processes in a manner that would not be expected of the majority of heterosexual couples. The omission of lesbian couples from adoption criteria obviously had a significant impact on the way Anne, Mary, Jen and Jenny have lived out their relationship, and that impact comes from an overt awareness of their exclusion, as lesbians, from the law. Further, this omission is tangible not only in the various moments when the women considered parenthood but also continues to be a tangible element in the relationship- the women are perpetually 'not parents'.

This awareness of exclusion was also informed by a more general knowledge of the legislative friction involved in being a lesbian mother. This was echoed by another respondent who brought up the homophobia of the Family Court system and spoke of the fear she lived with as a lesbian mother whilst she raised her now adult daughter (11). Although she had legal custody of her child, Jack felt there was always the threat that should her lesbian sexuality become a legal issue the custody decision could be revoked. She cited situations where friends had experienced just such a situation based on homophobic legal judgments. Awareness of legal omission, and the concordant prohibitive impact then, is socially, anecdotally and experientially constructed.

The scope of the omissions discussed by these women was vast, and the majority of issues related to the federal rather than state legislative systems. This is not surprising- the majority of legal omissions that affect lesbians in NSW occur at the federal level since the passage of the PRA. There is also a particular relevance and immediacy of these federal laws that would prompt their articulation. Omissions in law, such as those described in the interview, relate to every day areas of people's lives- affecting the distribution of their pay, their access to services and the structuring of families and work commitments. The majority of Acts covered in the PRA, conversely, relate to more special purpose situations- the purchasing of property, entering a retirement village and the injury or death of a partner, for example. Imagining use of the PRA has the added onus, in the majority of cases, of having to imagine unpleasant or tragic circumstances. It is hardly surprising then that many people find their rights under the PRA less relevant than the absence of the same in other, more immediate areas of law. That the women identify omission at the federal level however, does not nullify its use in this argument. The lesbian outlaw subject position is not exclusively based in state legislation. When the PRA passed, and enabled lesbians at the state level, it

simultaneously reinforced the omission of lesbians' rights at the federal level. This contradiction, as well as the contradictions that the PRA established in itself which I will discuss later, marks the lesbian outlaw. What is pertinent then, is that the women identify 'lesbian' legal interactions primarily in terms of omission and that this omission and the contradictions that it establishes (discussed in the next section) are primary indicators of the lesbian outlaw.

These trends raise a number of interesting issues. First, it brings into question the liberal democratic framings of the PRA as being about equality and rights. Clearly, when these women are talking, they are describing actual needs rather than abstract rights. They are discussing absences in legislation, and a sense of injustice rather than being focused on the equal (but piecemeal) rights that the PRA brought into being. The question (number 7) that prompts these responses asks about the role of law in the lives of lesbians. I would suggest that the persistence of 'omission' narratives in this context gives further evidence to my argument above that the PRA seemingly emphasised the outlaw position of many lesbians and establishes here an argument that the interview responses can be read as containing a lesbian outlaw subject position.

Contradiction as a lived reality

The second characteristic of the lesbian outlaw that is apparent in the interviews is the ability to reconcile with contradiction as a lived experience. I have argued previously that despite systematic omission from laws, the lesbian outlaw subject position is not detached from legal systems. This is supported by responses contained in the interviews. The women interviewed, as the above examples indicate, suggest a very close, although contradictory relationship between their lesbian relationships and legislative systems: Jack had legal custody of her child but knew her lesbian sexuality could be influential in a court revoking that legal status; Jo and Sarah knew and were living out their relationship in contradiction to their relationship status on legal financial documents, which also influence their relationship patterns. There is an obvious and intricate relationship between these women and the law, characterised by contradiction.

The significance of this, in terms of establishing a lesbian outlaw subject position, lies in the ability of these women to negotiate this contradiction. These women function by assimilating the contradiction into their lives. They can articulate it and the manner with

which they overcome the potential obstacles that it may otherwise pose. Liberal democratic rationalities, in their inability to admit contradiction cannot therefore accurately consider the lives of lesbians in legal systems. Liberal democratic interpretations like those of the PRA discussed in previous chapters, ensconced in claims to equality and rights, do not describe the experience of law for the people it claims to serve. It focuses on micro-level realities that do not correlate fully with the more complicated macro-level of lived experience. I have argued however, that a lesbian outlaw analysis take reference from contradiction- takes contradiction seriously. What this allows for is the potential for plurality. It gives rise to the potential of the margin of liberty because it denies a pure existence of binaries. When in-law and out-law are juxtaposed, as they are in a liberal democratic reading of law, then the options for 'other' theorising is limited. When they exist conjunctionally however, this plurality establishes the very condition for the explosion of the margin of liberty. An essential element to proving the outlaw then, is to establish this conjunction of in-law/ out-law, which this section seeks to do.¹³⁹

A characteristic of many of the interviews I conducted, and a characteristic, which has been echoed in various public forums where I have discussed the PRA, is the participant requests for information regarding what the act does and does not do. There is a distinct recognition by the women I speak with in lesbian relationships that the act is not comprehensive, that de facto legislation is now quite discriminatory in terms of what it covers, and in terms of who it covers. The passage of the PRA seems to elicit readily identified experiences of legal contradiction. The PRA has established a marker of legal acknowledgement that then makes visible the areas of non-recognition that these women experience because of their lesbian relationship. The contradictions of their experiences of law are enhanced because of the PRA.

Perhaps the most obvious of articulations of the law and its constant contradictory position with lesbians comes in the narrative of Jack. Jack is a long time campaigner for lesbian rights. She described the sense she had that progressions of laws for lesbians

¹³⁹ In establishing this conjunction however, it is important to note that they are not being established as binaries. The failing of liberal democracy, is to be unable to admit contradiction. As I have discussed in previous chapters this contradiction stems from the interactions of discourses rather than a conflict of binaries (Chapter Two).

and gay men didn't seem to be able to 'keep up' with the needs of her life. She said: "It always feels like the law doesn't necessarily relate to where I'm up to in my life." In recounting her story, she identified various stages in her life- as a single lesbian mother, as a person trying to negotiate property ownership and today as a person in a long term lesbian relationship- when the law did not offer her protection or recourse. Each stage, she argued, was proceeded by law reform that were outdated by her needs.

There are then, three levels to the contradiction that Jack lives with- past, present and future. There are past experiences of being abandoned (and in her case as a lesbian mother, potentially persecuted) by the legislative system because of her lesbian sexuality. These contradicted both her knowledge of herself and her relationships in that time, but more starkly, contradict with the experiences of many lesbians today who live with the legal sanctions now that she could have used then. Lesbian mothers, for example, are not routinely persecuted in courts because of their sexuality today, as they were when she was raising her child. The changing legal statuses of lesbians and lesbian relationships have established contradictions between experiences according to generation. There is also a contemporary experience of contradiction between the needs she has today and the ability of the legal system to meet them. For example, she discussed her recent dealings with government payment systems through the offices of Centrelink¹⁴⁰ and the lack of federal laws that would allow her to register her partnership on their official documents. She said: "...essentially they (Centrelink) say to you to lie because they don't recognise your relationship...and that doesn't sit easily because I like to be open and honest...It feels like a real denial of your relationship and you have to be careful not to internalise it." Jack's overt awareness in this comment is that the contradiction is pervasive and absolute. Her awareness that internalising such judgments is a potential issue highlights the intense and acknowledged link between lesbians and their contradictory existence with the law. This contradiction also extends to future imaginings of her relationship. For example, she spoke to me about her confused opinion regarding lesbian commitment ceremonies. On the one hand she was confronted by her belief that marriage is a patriarchal institution and that lesbians needed to avoid such constructions. On the other hand she believed that there was a

¹⁴⁰ Centrelink is the national government organisation that facilitates welfare payments.

subversive nature to lesbian commitment ceremonies because of their non-legal status. When considering her own relationship she told me:

When people say you haven't made a commitment to each other we always laugh and say 'yeah, we signed the mortgage'...how can you get a bigger commitment than a 25 year mortgage?... although on some level I would like some recognition of our relationship...some sort of ritual or acknowledgement of the relationship that we do have that isn't the mortgage!

The future imaginings of her relationship oscillate between legal acknowledgement (like the mortgage) and non-legal (and less firmly imagined) acknowledgement. There are contradictions inherent in both the desires themselves and the potential likelihood of legal changes that would meet these desires (for example, same sex marriage).

The impact of contradiction is one measure of its existence and the level of awareness of interviewees that it exists. Jack hinted at the impact of such constant contradiction when she discussed the need to refuse an internalisation (or assimilation) of the law's knowledge of her relationship over her own. The impacts are also more concrete. Anne, for example, told me that not being acknowledged for the purposes of superannuation "would probably be the thing that affects us most now..." The now she was referring to is her legal engagement post PRA.¹⁴¹ Anne has made compulsory payments to a superannuation fund that, because of federal laws, did not automatically recognise her lesbian relationship. She has willed the funds to her partner, but could not be guaranteed that her wishes would be fulfilled. Save agitating for law reform (which she has done), there were few other concrete options that Anne has open to her to rectify this situation. She was forced to live with this contradiction and the potential financial penalty that it dictates. Because of the structure of the law (in this case superannuation laws), contradiction is a condition of existence for many lesbians, such as Anne and her partner.

Jo and Sarah also raised the non-recognition of lesbian relationships in superannuation laws in their interview. They discussed similar contradictions as Anne and the potential negative impacts on their financial future. The attitude towards this contradiction however, was particularly interesting. Although there was a sense of outrage and

¹⁴¹ The *Superannuation Legislation (Choice of Superannuation Funds) Act 2004 (Cth)* altered this situation in 2004 so that people in same sex relationships, such as Anne, can nominate their partner as the recipient of their superannuation upon their death.

disappointment about legal omission, the contradiction this particular omission established was perceived in a positive manner. Since the passage of the PRA, the couple had taken de facto recognition as the measure of interaction that should be accorded to lesbian relationships in all instances, and agitated for that in daily interactions with authorities and organisations, including their banks and superannuation funds. Jo said: "...we are starting to use (the de facto status)... if it's not written there (on legal paperwork) we actually will ring and ask now whereas we wouldn't before." Jo and Sarah were using the PRA then, to highlight the contradictions they experience as lesbians within the Australian legislative system. They used it in an attempt to both fracture established systems of discrimination and to agitate for change in places where it would be beneficial for them.

If liberal democratic readings of the PRA were accurate, then it could be expected that women in long-term lesbian relationships, such as those found in my interviews, would experience the legislative system with a sense of equality and rights fulfilled. This however, is not the case. Some of the women interviewed acknowledged the legislative system as recognising their lesbian relationship and acknowledge the potential ramifications of this. However, in the majority of instances, these women experience the legislative system as encoding their discrimination and experience their rights as piecemeal. Their narratives articulate experiences of contradiction within the legislative system. This is only to be expected since the women interviewed are full citizens of the state and exist within the contradiction of simultaneous functioning under state and federal legislative systems. Adding the dimension of experience to an analysis of law further enhances the argument that the interviews incorporate a lesbian outlaw subject position where contradiction is a function of rather than a hindrance to the lived experience of laws.

Negotiating the outlaw/ in-law connection

Jo and Sarah's example illustrate one of the many ways that lesbians are forced to negotiate their contradictory existences within and without of law. This fluidity characterises the lesbian outlaw as both a discourse and as a subject position. Moreover this fluidity marks the power/ knowledge of the lesbian outlaw which will inform agency. If we are to assume that omission in law is not adequately represented by a repressive image of silence, then it stands to reason that 'other' knowledges, other

discourses are likely to be found in these spaces. This section then, examines the likelihood of this potential and how it plays out in the interviews.

Despite a prevailing narrative theme of legal omission, there is a distinct recognition in the interviews, that the law influences the lives of these women and their lesbian relationships. There is a distinct recognition too that the law 'knows' and articulates their lesbian relationships in particular ways. The counter, and contradictory narrative to this however, is that the women interviewed live their lives and their lesbian relationships in acknowledgement of the law, but also in defiance of and subversion to the law. There are a series of semi-legal and quasi-legal actions that I want to discuss from the interviews. Each action is raised by the women in particular defiance of either a legal solution that has contradicted the manner in which the women want to manage their relationships, or in place of a legal omission which contradicts the needs and desires of the women. The measure I would give to this does not lie singularly in the acts themselves, which may not necessarily be proof of defying legal knowledge. It lies too in the healthy dose of skepticism and subversive attitudes towards the rights and recognition they are granted through legal avenues and towards the ability of legislative systems to accurately meet these women's needs. These in combination mark again, a lesbian outlaw subject position within the interviews.

An example of this skepticism is illustrated in Jack's interview. Jack and her partner purchased their first house together after the passage of the PRA. She told me: "She [the solicitor organising property sales and the purchase] used it [the PRA] where she could to be helpful... I don't think it was that helpful in the long run." This quote demonstrates a willingness to use laws relating to same-sex relationships as well as skepticism of their utility. It also demonstrates the out of law element in this situation- the relationship property was bought regardless of the fact that the law did not help them to do so. Jack also raised skepticism regarding the type of relationships that the law recognised and protected, even after the passage of the PRA. Not trusting inheritance laws to accurately recognise the web of relationships involved in her life- her partner and mother with whom she bought the property, and her adult daughter towards whom she felt a need to financially protect- she had a solicitor draw up wills which clearly reflected her version of inheritance rights. Similarly, Anne and Mary had wills drawn up because "Neither of us wanted anything really going to our family. In

fact if we co-deceased we'd be leaving it to...charities..."¹⁴² The presumptive family structure of parents and siblings that intestacy laws hold forth did not suit the way this couple wanted to structure their inheritance. Their wills were an act to overcome this legal structuring process.

There was also overt skepticism of the law in Patricia's interview. When I spoke to Patricia, she had recently ended her long term relationship where co-owned property was involved. These women had also consulted a "dyke solicitor" to aide them in the process of property division. Patricia was careful to point out, however, that at no time did they need to refer to the PRA since they had drawn up documents about the purchase and split of the house themselves, having already negotiated percentages and processes. She was happy to say that the process was equitable and resulted in both women being able to purchase their own properties and begin their new lives with financial security. Similarly, Sand spoke of the document she and her partner had drawn up upon the purchase of their house. She explained:

Anything's possible... the relationship could end at any minute, realistically... we've seen it happen with other people a lot, that things get really messy. There's a real need for it to be clear because you don't want to be wading through that stuff in emotional turmoil and pain.

Sand's explanation refers to a specific lesbian history of omission from property division laws prior to the PRA. Whilst this type of contract is far from particular to lesbian couples, I believe that it indicates that the lesbian outlaw subject position sits in an uneasy relationship with legal ties. There is an acknowledgement that legal avenues exist and could be pursued, but the skepticism of such avenues is sufficient to prompt these women to make self-directed provisions such as these legal documents.

A further important consideration in the prompting of such avoidance, or the subversive use of the law, is the lesbian specific context with which they are made. Both Jack and Patricia approached property law in this way because they had previously experienced discrimination based on their sexuality in similar circumstances. Speaking of life prior to the PRA, Jack said: "I used to say I'd never buy a house or live with my girlfriend again- it's just too much to lose you know, you lose your house *and* your relationship..."

¹⁴² This was on the proviso that no one in either of their families were in need of something that they could offer- at which time they would reconsider their decision.

Similarly, Patricia said: "No f***n' way am I going into any property thing without something written...I think too many lesbians go into property things without protection."¹⁴³ The lack of legal recourse these women had experienced when their relationships had previously broken down marked the construction of their future relationships. Their omission from property legislation was not only tangible in the moment that they could not find legal recourse, but also progressed to a more general skepticism of the law's ability to fulfill specific lesbian needs. I think that these particular examples illustrate a subversive relationship between the outlaw and legislative discourse. I suggest this for two main reasons. Most obviously, Patricia has been aware of the legislation, but has chosen not to invoke it, having negotiated a process outside of legal solutions. But I also think that the use of a solicitor in drawing up and following through with this essentially non-legal solution¹⁴⁴ is a nice subversive twist.

This type of negotiation between the outlaw and legislative discourse also played out in the interview with Jo and Sarah. After the passage of the PRA, they held their commitment ceremony, and cited the Act in their speeches to family and friends. Jo told me:

If my family couldn't acknowledge it [her lesbian relationship] then we hoped our friends could acknowledge our relationship and if one of us were sick and the other needed visitation rights...[it was] our way of facilitating that openness about our relationship.

The PRA was a concrete legitimacy of their relationship to counter the reluctance of their families in particular, to recognise their commitment and love for each other. But at the same moment that their legal recognition was being cited, they were participating in a ceremony that is not legally recognised. The ceremony was a non-legal replacement for their legal omission from state sanctioned registration of their relationship. The subversive nature of this is overt, as is the irony. It illustrates well, the contradictions that lesbians are forced to reconcile into their relationships because of the law. Jo and

¹⁴³ The documents Patricia refers to in her particular situation, were not contracts. As such, they are non-binding and would not stand up in court. However, they could be considered by a court in determining whether or not a relationship existed between her and her (now ex) partner.

¹⁴⁴ The wills of Jack and her partner are legal documents. I make the distinction between legal documents, such as wills, and legally binding ones, such as contracts. Jack's will, like anyone's, could be contested in court. The history of court treatment of wills made in recognition of lesbian and gay partners (albeit prior to the PRA) suggests that this likelihood is often significant. I thus qualify such documents as semi-legal. The types of relationships outlined in a will are guides but they still have to be translated and recognisable through laws available to a court if contested.

Sarah encompass their legal inclusion and exclusion in the same moment. They simultaneously incorporate what the law offers them, and act in a way that meets their needs as lesbians in a committed relationship, where the law does not offer to do so. There is no clear demarcation of in-law and out-of-law. There is instead, a complicated, quasi-legal, contradictory outlaw solution.

The extent to which this outlaw situation was preferable to in-law status, was best summed up by Anne, who spoke about a group of lesbians in France who were trying to have the legal privilege accorded through marriage laws abolished. She said: "Rather than us trying to have our relationships recognised...[they want] to stop the law giving privileges to married couples...I think that's really good." For Anne, the act of delegating legal privilege according to sexuality and marital status was illogical. Although she did not advocate for an abolition of laws such as intestacy and tax laws that are absent from her outlaw experience, she did advocate for a type of outlaw freedom. That is, she advocated for laws to be untied from relationships as mostly they are in the case of lesbian relationships.

8.4 Outlaw Agency

At the outset of this thesis I made two claims. The first was that the PRA was produced through liberal democratic discourse and as such was not able to admit contradiction. The second was that the recognition of contradiction was a necessary condition for the articulation of legal experiences of lesbians. The interviews, described above and in the previous chapter reinforce both of these claims. What they also indicate however is that despite this misfit of experience, need and legislation, the experience of lesbian interaction with law is not wholly negative. Indeed, they suggest that through quasi-legal interactions, or outlaw imaginings as I would categorise them, there exists a positive power relationship between lesbians and the law (including the silence and contradictions that exist). It was my supposition prior to starting this research that there existed different processes, ulterior to legislative solutions, that resolved the same issues presumed by the PRA. I suspected too that these processes were likely lesbian specific. Although the PRA set out to meet many immediate and real needs of women in same sex relationships, it stood to reason that not all lesbians needed- or indeed desired- such provisions. The extraordinarily long history of exclusion of lesbian relationships from

legal recognition and provisions certainly resulted in cases of brutal injustice. However, not all experiences of lesbian relationships could be so negative. As the interviews have indicated, the experience of contradiction, including the experience of exclusion from law within lesbian relationships is not wholly negative and can act as a catalyst for the development of an outlaw agency.

Whilst the negative effects of discrimination that the law seeks to redress cannot be understated, the power/ knowledge relationships within lesbian outlaw discourse is deserving too of greater agency in effect. Examples contained within the interviews such as commitment ceremonies and the development of financial documents and understandings have been developed in reaction to legal exclusions. However, they are also legitimate solutions in and of their own right and to assume the preference of legal solutions is to grossly underestimate the power dynamics. There is agency within these acts in both the defiance of legal omission that they represent and in the power/ knowledge relationships that construct them. Patricia chose *not* to invoke the PRA in the division of finances and property after her relationship breakdown preferring her quasi-legal and pre-emptive solution drawn up by her "dyke solicitor". As held by Foucault, and underlying the development of lesbian outlaw discourse, power relationships that are reciprocal in nature are imperative considerations in understanding any given situation. Whilst the effect of exclusions are real, so too are acts of resistance that may arise in the same moment and from the same situation.

Throughout this thesis I have held that legal discourse is a dominant discourse and as such presents its knowledge as truth aiding the process of governmentality. In doing so it constructs binary understandings and categories suggestive of the possibility for inclusion and exclusion. However, I have argued the need for discourse to be understood as more fluid in character. The interactions of power/ knowledge are dynamic and multiplicitous and interact within discourses as if the boundaries were permeable. The specific instance of lesbian outlaw discourse illustrates this type of interaction. If we take for example some of the quasi-legal actions created within this discourse the interactions of lesbian specific knowledge and legal knowledge can be articulated. Patricia and her partner created pre-emptive documents detailing the split of finances and property should their relationship end. These were drawn up by a solicitor, but they did not have recognition and nor were they enforceable under Australian law.

Within the context of the lesbian relationship however, they were enforceable and utilised as if they were legally contractual. In another example, the commitment ceremony of Jo and Sarah referenced the PRA to invoke legal obligations and recognition of their lesbian relationship. In both of these situations, lesbian specific considerations interact with legal ones to construct knowledges that are outlaw but not entirely out of law.

In the instance of legal knowledge such as the PRA however, this interaction of discourse is not as evident. The agency of outlaw discourse, represented by the individual experiences of lesbians is not accounted for within this legal discourse. As the Chapters Four and Seven indicated, the extension of the heterosexual model and characteristics of a *de facto* relationship to include same sex relationships in the PRA leads to cases of discrimination against lesbians.¹⁴⁵ In some cases, for example the maintenance of an exclusively heterosexual definition of *de facto* relationship in some acts of NSW legislation, this stems from the heterosexist basis of legal discourse. However in some cases this discrimination stems more overtly from a lack of legal reflection on lesbian relationships.¹⁴⁶ The characteristics for finding a *de facto* relationship for example, stem from judicial precedent in finding heterosexual relationships and many times are not relevant and do not aid in finding a lesbian relationship. The specific knowledge of lesbian relationships is not evident in the PRA even though it was ostensibly created to enable the recognition of same sex relationships under NSW law. The permeable boundaries between discourses appear only to flow one way.

The analysis of the PRA contained in previous chapters indicates that this refusal of permeation into law has almost disastrous effects creating legislation that is misfitting of lesbian relationships. If the knowledge from lesbian outlaw discourse was incorporated into legislative discourse using this same discursive flow process, there are a number of immediate reflections that can be made on the PRA. Some of these reflections lead to changes to the PRA that are arbitrary in nature. For example, the list of indicative characteristics of a *de facto* relationship contained in the PRA at s.20

¹⁴⁵ And gay men, although this is beyond the scope of this thesis.

¹⁴⁶ There is an underlying heterosexism about this act too.

clearly needs to be amended if lesbian relationships are to be found without prejudice. The statement indicating that this list is not exhaustive does not appear sufficient in overcoming the failings of these characteristics in describing a lesbian relationship. Similarly related to the inability of the PRA to see lesbian relationships, those aspects of the PRA that contain exclusively heterosexual definitions of a de facto relationship need amending so as not to discriminate against people in a same sex relationship.¹⁴⁷ It is also clear that the prohibitive statement found at s.62 of the Act needs to be removed. This statement reinforces norm/ deviant understandings of heterosexuality and homosexuality constructing a symbolic division between and hierarchy between the two. Such changes would amend the PRA as currently scoped to take account of lesbian relationships in a direct and overt manner.

However, this thesis has also raised a number of other considerations that arise because of the PRA but are outside of the scope of this Act as written. Some of these are still tangible considerations. For example, the PRA still establishes a hierarchy of relationship type in terms of the scope of recognition and the access to legal resources that accompany this recognition. Primarily this concern arises in relation to provisions for federal relationship recognition (for example tax law, government allowances and superannuation) and access to laws that relate to children and families (for example access to the family court and adoption laws). The *Anti-Discrimination Act 1997 (NSW)* also needs to be brought into line with the PRA so that same sex relationships are feature in the definition of a relationship protected against discrimination (Luker, 1999: 3). However, there are less tangible considerations to be made also. The lobbying process and history of Bills un-passed by Parliament for example, indicate other forms of legal recognition for same sex relationships that may be preferable to de facto laws. There is an ever increasing consideration to be made about whether the extension of marriage laws to same sex relationships is desirable. And, as the interviews have indicated, consideration also needs to be given as to whether recognition in some areas of the law is desirable at all or whether other systems and structures could be put in place to meet the needs of people in same sex relationships.

¹⁴⁷ I would say too that the scope of the PRA also needs review however this is beyond the realm of consideration in this thesis.

This thesis has reflected on the construction and effect of the PRA and has suggested theoretical frameworks with which to consider these things. It is beyond the scope of this thesis to construct specific responses to the considerations that this reflection has raised. However, I do believe that there is a theoretical imperative from this work that needs to be articulated and that is that discursive flow is an imperative to constructing legal knowledge and legal truths if they are to have a reasonable semblance to the lived reality that they govern. As I have argued previously, there is no hope that legislation will accurately reflect the lives of individuals in the mirror image. There will always be a symbolic element to legislation. However, the symbolism of legislation such as the PRA ranges from an abstract version of limited rights and incremental equality through to overt heterosexism and in some instances, homophobia. The lived reality of lesbian lives is decidedly absent.

Ruthann Robson, in her book *Lesbian (Out)Law*, advocates for the development of a lesbian legal theory where the experiences of lesbians are central (1992: 13). Her work details the processes of “domestication” (1992: 18) as lesbian lives and relationships are entered into law- a process whereby the specifics of lesbians (the specific of sex) are rendered ‘like’ other relationships, assimilated and transformed into a dangerous falsehood (1992: 12). As Didi Herman has argued however, the essentialism that underpins this type of theoretical quest is problematic- she asks, who is a lesbian and why is lesbianism more of a correct base to begin legal theorising than any other identity base (1995: 182-83)? There is a need for legal responsiveness to lesbians, lesbianism and lesbian relationships however, there is also a fine line to walk in discerning this process. In arguing for a focus on the lesbian outlaw as a subject position and discourse, I have attempted to overcome the essentialism of ‘lesbian’ that is so problematic in theorising. I believe, as Herman insists, that we all “hold multiple social identities” (1995: 181) and as I have discussed in Chapter Two the imperative of discursive imagining is to allow for this fluidity and contradiction. I do not hold that any one person will be captive within a lesbian outlaw subject position or discourse in her daily interactions, even with the law. It may be as Herman and Shane Phelan have argued in response to Robson’s work, that the primary identifier in any given situation may not be their lesbianism (Herman, 1995: 187; Phelan, 1995: 196). However, the lesbian outlaw is a useful concept if we are to allow a number of considerations outlined in this thesis, particularly fluidity.

The lesbian outlaw is constructed through interactions of lesbian lives with legislative discourse. Whilst the interactions are evident in this discourse, they are absent in legal discourse as represented in the PRA. I do not advocate a separate lesbian legal system or even a separate process of legal theorising. I do however, advocate for a greater responsiveness of legislative systems and legal theorising through discursive exchange. What is central to this thinking is an understanding of agency ulterior to law and a willingness to examine the interconnections and fluidity of discourse. What this means in practical terms is something that needs greater attention and exploration. I suspect it means more careful research into lesbian communities and relationships, greater consideration of the absence of lesbians in all aspects of legislative systems and most of all, the de-centering of heterosexist constructions and discourses within legislative thinking and processes. This is an ongoing, timely and likely costly process. What is evident however, is the extent to which this is not currently happening and the negative impacts that result.

8.5 Conclusion

If we are to establish legal inquiry that is capable of understanding the experiences of lesbians and their interactions with laws and legislative systems, then it must be capable of understanding contradiction. More than this, it must be able to take contradiction seriously. In the first instance, this is because contradiction characterises this specific experience. As I have discussed throughout this thesis, this is something that liberal democratic theory is unable to do. In maintaining this inability, liberal democracy cannot adequately understand or articulate the lesbian experience. In the second instance however, and what I believe to be more pertinent, is that if legal theory is to ignore contradiction, then it also ignores the creative potential that emerges from the friction it produces. The PRA emerged from an understanding of the legal system based in liberal democracy. The silence of lesbians and lesbian relationships in law was read as repression. In specific situations, this was indeed the effect. However, what Foucault's work encourages is an exploration beyond effects of repression and into the function of reciprocal power. An outlaw analysis capitalises on this notion of productive power and seeks it out in the margin of liberty where activity, outside of dominant systems, is rife. Here, as evidenced in the interviews, options outside of dominant ones

(in this case, laws and legislative systems) circulate. The options open to legal based theorising thus increase accordingly with these.

The interviews draw out a complex and contradictory relationship between the lesbian outlaw subject position and legislative discourse. The interviews revealed a pressing need and desire for recognition of lesbian relationships in terms of property. Other omissions discussed in the interviews were generally in sync with the omissions that the PRA did not seek to remove: namely, public recognition such as relationship ceremonies and lesbian parenting. The women I have spoken with have certainly met the passage of the PRA with welcome but its implications have not eased the outlaw's position as much as it has perhaps reinforced it. The PRA acted as a reference point for articulation of her continued and now overt omissions from legislation. This acknowledgement created tensions between the desire to be included in legislation, the freedom in not being included, and skepticism towards the practicability of legal inclusion.

Whilst ever there is this legally sanctioned segregation of relationship types, the lesbian outlaw subject position will remain just that. But what the interviews also suggest is that her position may be maintained regardless of her inclusion in law. I would argue that a history of omission and exclusion and non-recognition can not easily be eclipsed by new laws- if nothing else, it will be a difficult path to ease the skepticism towards legal reform. But I also suspect that legal reform will not always be embraced where other non-legal, or quasi-legal alternatives have been developed. The historical silence of the law on lesbian relationships runs parallel to a lesbian history of relationship negotiation, which is non-legal. I certainly believe that the legislation was not developed to replace these systems. It was rather, to counter the discrimination and unfair treatment of lesbians and gay men where legal redress would be preferable. But the marked non-use of this legislation and other legislation similar to it needs to be examined.

I want to hark back to the previous chapter, and the question I raised there: where are the litigious lesbians? In light of these interviews it would seem they are getting on with their lives, or at least still waiting to be convinced that the legal system is worth engaging with. Jenni Milbank raises this point in her examination of ACT property legislation, which has included lesbians and gay men since the early 1990s. She argues

that this legislation is under-utilised by lesbians and gay men, and that the reasons for this need to be examined from perspectives other than those which are strictly legal. I would argue that the symbolic examination of the lesbian outlaw is one such perspective that begins piecing together the complex relationship between lesbians and legislative discourse. 'In-law' rationalities are marked by a distinct containment within binary understandings. The lived experiences of lesbians engaging with legal systems are more complicated than this, marked by the level of contradiction involved. The narratives of these women appear much better rationalised and capable of being articulated through a more 'outlaw' approach.

Conclusion

Because I am a person who rarely stops hoping, I believe it is worth engaging with these questions and entering a dialogue. Our future may depend on it... I believe that we can indeed create our own destiny and the future of humankind. (Dorothy McRae-McMahon, 2001)

At the outset of this thesis I argued that the treatment of lesbians and gay men throughout Australian legal history was a grim one. It has been characterised, at various times by murder, torture, discrimination and a general lack of regard for the humanity of lesbians, gay men and their families. Throughout this thesis I have examined the *Property (Relationships) Act 1984 (NSW)*- an Act of state legislation that goes against this tradition of overt discrimination, offering lesbians and gay men in New South Wales some rights and recourse within the legislative system. This is a trend that has since been repeated, with varying (usually greater) affect throughout the majority of other states and territories in Australia. At the federal level of legislation however, this trend has not been continued. Indeed, Federal Parliament has acted to limit the implications of these state based law reforms and have tightened federal laws so that future reform at this level, for lesbians and gay men, will be a mammoth and difficult task. The contradictions of being a citizen of Australia and identifying as lesbian, gay, homosexual, queer, bisexual or transgendered, have never been as prevalent as they are today.

Liberal democracy has been demonstrated throughout this thesis, to be decidedly insufficient in rationalising and articulating this contradiction that characterises the experience of homosexuality within Australian legislative systems. It offers at best, over generalisations such as equality, justice and rights, that mask the complexity of these legal situations and in doing so, mask too, the discrimination and ill effects of such that people experience. I have argued that the benefit of liberal democratic ideals such equality, justice and rights, are to encourage a movement towards human rights and dignity, and to establish bench marks against which laws can be measured for their fairness in the treatment of groups of people. This is essential for the function of democracy. However, it does not accurately describe or understand contradiction and therefore is limited in its function to critique laws and reforms such as the PRA which have contradiction as their very basis.

The PRA contains a specific of sex and therefore the nature of contradiction found in the PRA is specific to the situation of lesbians and gay men. In this thesis I have concentrated on the particularities of lesbian experiences of the PRA. This thesis has illustrated the specific of sex at work in the construction and function of the PRA and posited it as the key cause of contradiction. This is because the specific of sex is articulated through speaking sex within a project of governmentality. I have argued throughout this thesis that governmentality processes have structured the PRA so that it enabled lesbians and gay men at the same moment that it attempted to contain and maintain their legal definition within the parameters of deviance. Because of the specific of sex, I have argued, liberal democratic theory is also insufficient as a means with which to interpret and articulate the PRA. This is because it does not adequately account for the implications of specific acts of discrimination, being based instead on grander notions of human rights and equality *despite* difference.

The final criticism that I have laid against liberal democracy is that its tendency is towards binary divisions and hence its tendency is also towards the inclusion of lesbians and gay men into dominant discourses and power/ knowledge regimes. I have argued that this process of inclusion paradoxically excludes other power/ knowledges, such as those found in lesbian outlaw discourse, and in doing so, refuses to legitimate various formations of 'other' that may provide useful insight into legal situations. I have argued that liberal democracy acts in this way as a process of governmentality that obscures the margin of liberty and the possibilities contained in multiple non-mainstream discourses and the resistant power contained within them.

In arguing these things of liberal democracy, I have suggested that the situation of lesbians and gay men within the legislative system remains under investigated and understood. To counter this I have proposed the employment of the lesbian outlaw. Throughout this thesis I have characterised the lesbian outlaw as both a discourse and a subject position. As a discourse the lesbian outlaw is a site of power/ knowledge that challenges mainstream legal theory and practice. As a subject position the lesbian outlaw is a social position through which women may experience the law and their relationships. It is not a totalising standpoint, nor is it uniform in its characteristics. However, through this subject position, through this relationship with laws and legal

systems, experiences are formed that are necessary to the project of articulating lesbian narratives within legal theory. I have argued that legal theory and reform processes may benefit from an understanding of the lesbian outlaw in this way.

In this thesis I have offered an account of the PRA using a lesbian outlaw analysis, juxtaposing this against liberal democratic accounts of the same. This has been to highlight the insufficiencies of liberal democratic accounts. It has also been to demonstrate the points at which liberal democracy and lesbian outlaw accounts are similar and to highlight in doing so, the potential alliances between the two theoretical interactions with laws and legal systems. Throughout the thesis then, I have also advocated for the use of the lesbian outlaw as a method of socio-legal inquiry. I have argued for its incorporation into established theoretical genres, particularly feminist jurisprudence, where I believe it may enhance the function of liberal democratic theory by giving an account of lesbian experiences and by offering multiple strategies to processes of lesbian interactions with legislative systems. In particular, I have advocated for its use in attempting future law reforms for lesbians and gay men since it interacts with the lives and symbolic situations of these people to a greater extent than traditional liberal democratic rationales and theories have demonstrated they are capable of achieving.

Like others before me,¹⁴⁸ I do not pose the lesbian outlaw as a totalising theory but rather as another inroad into the constant struggle to have lesbian's lives and relationships treated with humanity and dignity within what are otherwise civilised and developed countries such as Australia. At the conclusion of writing this thesis, the Australian people re-elected the Liberal conservative Howard government for its third term in office. The current Federal Parliamentary table of Bills includes the "Marriage Amendment Bill 2004" which defines marriage as being explicitly between a man and a woman, refuses the acknowledgement of same sex marriages from countries where they are legal, and prevents same sex couples from international adoption processes. The NSW Parliament, a Labor and supposedly less conservative party held parliament, features bills such as "Adoption Amendment (Same Sex Couples Prohibition) Bill

¹⁴⁸ Ruthann Robson says: "We should not refrain from beginning... simply because we cannot exhaustively define the parameters of our theorising." (1992: 21).

2004” and numerous failed bills such as “Anti Discrimination Amendment (Removal of Exemptions) Bill 2003” which have aimed at increasing the coverage of legal protection for lesbians and gay men. Each of these bills, some of which have already passed into law, systematically enforce the position of lesbians and gay men as deviant and in some cases attempt to remove the few legal recognitions and enablements that lesbians and gay men have assured in the recent past. Their very existence makes a symbolic mockery of the PRA as it has been presented through liberal democratic discourse- as fostering equality, justice and human rights. They indicate that wins are transient and the battle is constant. They indicate too that our thinking to this point has been limited in some way since we have failed to assure the protections of humanity that, as a nation we have signed to through our participation in the United Nations. I offer the lesbian outlaw, and this thesis, as another thinking process- without making grand claims of universal applicability- but with an eternal ‘hoping’ and a conviction that says there must be something better.

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Appendix I

Laws Governing Same Sex Relationships: State and Territory legislation, Australia 1999-2004.

Australian Capital Territory:	<i>Legislation (Gay, Lesbian and Transgender) Amendment Act 2003 (ACT)</i>
New South Wales:	<i>Property (Relationships) Act 1984 (NSW)</i> <i>Miscellaneous Amendments (Relationships) Act 2002 (NSW)</i>
Northern Territory:	<i>Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 (NT)*</i>
Queensland:	<i>Property Law Amendment Act 1999 (Qld)*</i>
South Australia:	No recognition currently provided [△]
Tasmania:	<i>Relationships Act 2003 (Tas)[#]</i>
Victoria:	<i>Statute Law Amendment (Relationships) Act 2001 (Vic)</i> <i>Statute Law Further Amendment (Relationships) Act 2001 (Vic)</i>
Western Australia:	<i>Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)</i>

* Includes parenting provisions.

△ “Statutes Amendment (Relationships) Bill 2004” currently before parliament.

includes relationship registration provisions.

Appendix 2

Cases Heard Under s20 of the *Property (Relationships) Act 1984 (NSW)*:

Same sex relationships June 1999-June 2003

Dridi v Fillmore (2001) NSWSC 319.

Devonshire v Hyde (2002) NSWSC 30.

Hooper v Winton (2002) NSWSC 1071.

Mair v Hastings (2002) NSWSC 522.

Appendix 3

Interview Advertisement

Long Term Lesbians Wanted!

Are you in a long term lesbian relationship?

or

Have you been in a long term lesbian relationship?

Are you willing to tell your story?

Erin Cahill is a PhD student in Sociology at the University of Wollongong. Her work aims to compare lesbian relationships as they are lived with lesbian relationships as they appear in the law. She is looking for people with experience in long term lesbian relationships to interview for her thesis. No legal knowledge is required, only a willingness to talk about your relationship.

If you are interested in finding out about this project or being interviewed, please contact Erin on:

(02) 42 21 5353 (office) or 0401 091 697 (mob)
or e-mail at eec01@uow.edu.au.

All messages will be answered

This project has been reviewed by the UOW Human Ethics Committee
phone: (02) 42 21 4457

Appendix 4

Participant Information Pack

"Lesbian Relationships and the Law: A Canadian/Australian Comparison"

Primary Researcher Erin Cahill
PhD Candidate in Sociology, Faculty of Arts, University of Wollongong, Northfields Ave, Wollongong NSW 2522
Phone: (02) 4221 5353 e-mail: eec01@uow.edu.au

Participant Information Sheet

I am a PhD student in Sociology at the University of Wollongong. I have completed an undergraduate degree in English and Sociology at the University of Wollongong with Honours at the University of Sydney in Gender Studies. For my PhD I am writing a 90 000 word thesis, in an area of my own choosing, due to be submitted in 2004.

My thesis is a comparison of lesbian relationships as they appear in law, with lesbian relationships as they are experienced by the people who live in them. It is anticipated that this comparison will be made using both the Australian and Canadian experience. The thesis will have three chapters based on a series of interviews about long term lesbian relationships. To that end, I am interested in interviewing women in the South Coast area who are, or have been, in long term lesbian relationships. Recruitment of participants will be through their voluntary response to an advertisement regarding the project. Interviews will be based on a series of questions, a copy of which is attached to this information sheet. People who are interviewed can elect to be interviewed on their own or with partners. I expect the interviews to take between 1.5-2 hours. All participants will be interviewed once, and have the option of receiving feedback from this project once it is completed.

Interviews will be audio-taped. The interviewer (Erin Cahill) and academic supervisors will have access to these tapes, as will any potential transcribers who will be made aware of their confidentiality requirements regarding the content and origin of the tapes. The taped interviews will be destroyed after they are transcribed to help preserve participant's confidentiality. Transcriptions will be coded so no names will appear in the transcripts unless express permission is given by the participant for their name to be used.

These interviews will be used as a part of my thesis, including direct quotes although full transcription of the interviews will not be submitted. Names and identities of the people interviewed will not be disclosed in the thesis. Participants, and any third party mentioned in the interviews will be assigned pseudonyms, so no real names will be published in the thesis unless express permission is given by the participant to use their name. Participants should be aware however, that despite these efforts, the interviews will involve descriptive accounts of life stories and will be linked to the South Coast area. As such, no guarantee can be made that some potential link between these two facts will not be made. I will, of course, take all possible precautions to prevent this.

Participation in this project is completely voluntary. Participants may withdraw from the interview process at any time before, during or after the interviews. Withdrawal from the project will not, in any way, affect your treatment or relationship with the Sociology Department or the University of Wollongong.

I hope to conduct the interviews from January to June 2002. I am eager that the interview process be as easy and convenient as possible for participants. A room has been made available at the University of Wollongong for the interviews, however should it be easier, I am happy to discuss other places that you would prefer to be interviewed. Interviews will be at a time of your convenience.

If you have any questions about the interviews or the thesis, please feel free to contact me by phone or by e-mail as above. Verification of this project can be sought from either of my two supervisors at the University of Wollongong, Rebecca Albury (02) 4221 3630 and Dr Fiona Borthwick (02) 4221 4972. Thank you for your time in reading this. Please understand that this Information Sheet and the questions are your copy to keep.

Yours sincerely,

Erin Cahill

Rebecca Albury (academic supervisor)
History and Politics, Faculty of Arts, University of Wollongong,
Northfields Ave, Wollongong NSW 2522
Phone: (02) 4221 3630 e-mail: ralbury@uow.edu.au

Dr Fiona Borthwick (academic supervisor)
Sociology, Faculty of Arts, University of Wollongong,
Northfields Ave, Wollongong NSW 2522
Phone: (02) 4221 4972 e-mail: fiona@uow.edu.au

Any person with complaints or concerns about the conduct of this research can contact the Secretary of the University of Wollongong Human Research Ethics Committee on (02) 4221 4457.

Appendix 5

Interview Questions

"Lesbian Relationships and the Law: A Canadian/Australian Comparison"

Primary Researcher Erin Cahill
PhD Candidate in Sociology, Faculty of Arts, University of Wollongong, Northfields Ave, Wollongong NSW 2522
Phone: (02) 4221 5353 e-mail: eec01@uow.edu.au

Interview Questions

- 1 Can you describe to me an average working day in terms of who does what in the relationship
- 2 How does this change on the weekends?
- 3 Could you tell me about your living arrangements and how decisions about your living arrangements were made?
- 4 Can you tell me about how your finances are organised?
- 5 What do you think the main influences have been on the way you have formed and the way you live in a lesbian relationship?
- 6 Can you tell me about reactions people have had to your relationship and how you think other people see your relationship?
- 7 Could you tell me about the role you think law plays in your relationship or lesbian relationships in general?
- 8 And can you discuss any specific dealings you have had with the law because of or involving your lesbian relationship?
- 9 Can you describe some of the ways you think lesbian relationships are different to heterosexual relationships or even gay male relationships?
- 10 Finally, if there was one thing that you could tell people about lesbian relationships, that you don't think many people know or understand, what would it be?

Rebecca Albury (academic supervisor)
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